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Implied terms of employment

Richardson J opens his dissenting decision in the case of *Brighouse Limited v Bilderbeck and others* (Court of Appeal, 10 October 1994) with the following comment:

> Redundancy is an area of employment law and industrial relations where those concerned, employee and employer, ought to be able to determine at the time what their respective rights and obligations are. They should be able to plan with confidence.

With all due respect to the majority of the Court (Cooke P, Casey J, and Sir Gordon Bisson) *Brighouse* is not a decision that is likely to have that result. Perhaps, however, it will lead to greater care and precision in the drawing up of employment contracts because the case was decided on the basis of the Court being prepared to read in an implied term regarding redundancy where the contract is silent on the point.

The Employment Contracts Act 1991 perhaps brought into play some legal principles and concepts that the politicians overlooked. Implied terms might well be one of them. Trying to shift employment law away from the complexities of industrial law involving trade unions, into the presumed simplicities of one-on-one contracts merely raised different complex legal issues. The eighth New Zealand edition of *Cheshire and Fifoot's Law of Contract* has a small section at p 16 dealing historically with implied contracts.

> The use of the concept of an implied promise has a long history in the law of assumpsit; implied promises to pay debts had, for example, been used as a basis of liability in *indebitatus assumpsit*, and there are other early examples of the implication of promises by the courts to produce just results. In eighteenth and nineteenth-century law the courts made extensive use of the notion of an implied term to read into particular contracts normal or usual incidents of that type of contract. In doing so, whilst purporting to fill out the understandings of the parties, what might in reality be involved was the imposition *ab extra* of standards derived from continental mercantile law or civil law. . . . In the implied term the courts possessed a conceptual device of great potential, but one which suffered from one major drawback – in principle an implied term could never override an express provision, however unjust its operation. Much of the development of contract law in this century has been provoked by attempts to grapple with this difficulty.
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> For history continues, and although the present century has not perhaps witnessed so extensive a reformulation of the categories of contract law as the last, it has nevertheless produced a considerable body of new law. Thus the doctrine of frustration, though its roots lie back in the early nineteenth-century law on charterparties, has acquired a prominence it never possessed in the nineteenth century: again the doctrine of promissory or equitable estoppel, though again based on nineteenth-century case law, has been put to new uses. In a historical system of law change has both to be fitted into the past, and if possible justified by reference to it, and the manner in which new departures are presented makes it peculiarly difficult to differentiate radical innovation from mere elaboration of existing doctrine. Perhaps the most general significant change has been a general tendency to reject the nineteenth century's confidence in the virtues of freedom of contract and the associated will theory, without the adoption of any very clearly formulated alternative.

In the *Brighouse* case the Court did not embark on any jurisprudential voyage into the uncharted waters of theory. It simply took for granted the power of the Court to imply a term to achieve a particular result. What the long term effects of the judgment might be remain to be seen, because the President at p 15 of the typescript of his judgment indicated that any express provisions of a contract regarding redundancy would be effective. The President did go on however to add a saving clause to the effect that this would be so, "save possibly in very exceptional circumstances". And later on the same page he said, in a somewhat different context admittedly, that the circumstances of individual cases would always require consideration.

The facts and issues in *Brighouse* are stated by the President at the beginning of his judgment:

> This is an appeal pursuant to the Employment Contracts Act 1991, s 135, from a judgment of Chief Judge Goddard delivered in the Employment Court on 17 June 1993 and reported in [1993] 2 ERNZ 274. Such appeals are limited to the ground of error of law. The case raises important questions about redundancy. The four respondents to the appeal were the applicants in personal grievance proceedings based on claims of unjustifiable dismissal. These claims were upheld by the Employment Tribunal (Mr A Dumbleton, sitting in Auckland) in a decision delivered on 24 April 1992 and reported in [1992] 2 ERNZ 161. The Chief Judge upheld the Tribunal's conclusion that the dismissals were unjustified but held that the Tribunal had erred as to the quantum of monetary compensation and remitted that question to the Tribunal for reconsideration.
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> Mr Larsen was the marketing manager of Brighouse Limited and the other three claimants were project managers. The salaries of the claimants ranged from $48,000 to $52,000 with certain further benefits. At the date of the dismissals Mr Bilderbeck had been employed by the company for more than four years, the others for varying lesser periods. Messrs Bilderbeck, Larsen and Pearson were based in Auckland, Mr Thrush in Wellington. Brighouse Limited had become under the control or ownership of Hawkins Construction Limited, part of the McConnell Dowell group of companies. On 11 July 1991 without prior warning the three Auckland-based men were called with the rest of the staff into the employing company's office in Auckland and informed by Mr Gordon, the general manager of Hawkins Construction Limited, that McConnell Dowell had sold the Brighouse operation. A standard letter was handed to each of them terminating the employment on 11 August 1991. Mr Thrush was notified by telephone and a similar letter was sent to him. The claimants were expected to continue working until 11 August and did so.
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> Each contract of service provided for termination on one month's notice on either side; the contracts made no reference to redundancy. The employees were told on 11 July that the purchaser of the business was Mr Warren Brighouse, who had initially sold the business to McConnell Dowell. On 11 July no mention was made of any redundancy compensation. Mr Brighouse apparently took over the running of the business almost immediately. In the event Messrs Bilderbeck, Pearson and Thrush obtained employment from Mr Brighouse on nearly the same terms, but Mr Larsen did not: there had been some history of personal difficulties between him and Mr Brighouse.
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> On 12 July 1991 Mr Larsen asked Mr Gordon whether redundancy compensation was to be paid. Mr Gordon said that the employer had honoured its contractual obligations by giving the month's notice but that he would think about the request. A week later he wrote to each of the present respondents intimating that in addition to annual and statutory holiday pay there would be a lump sum. This sum appeared in each case to represent one week's wages for each year of service (1 + 1). Before the Employment Tribunal each claimant gave evidence to the effect that he regarded the company's treatment of him as callous: the announcement of the redundancy had come suddenly, the limited payment had to be clawed out, there was no counselling nor any consultation about redeployment in the McConnell Dowell group, each man was left to fend for himself and make what arrangement he could with Mr Brighouse. Mr Larsen explicitly asked Mr Gordon about the possibility of redeployment within the group but heard no more about the matter.
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> The claimants did not and do not dispute that they had become genuinely redundant, in the sense that in a phase of downturn in the construction industry the owning group had sold the Brighouse business; but they claimed that they had not been treated fairly and reasonably in the manner in which their dismissals were dealt with and in the amount of compensation. In these respects they contended that their respective dismissals were unjustified. Both branches of this claim were upheld by the Tribunal.

Much of the discussion in the judgments concerned obiter comments by Somers J and Bisson J in the case *G N Hale & Son Ltd v Wellington Caretakers IUW* [1991] 1 NZLR 151 (CA). In his judgment in *Bilderbeck* at p 11 Sir Gordon Bisson confirms that in his view the Chief Judge had correctly applied the decision in *Hale* which originally had been referred back to the Employment Court. The President summed up the view of the majority in *Bilderbeck* at p 9 in the following words:

> The results arrived at by the Employment Court in *Hale* and by both that Court and the Employment Tribunal in the present case were an application of the principle that there is implied in a contract of employment a term that the employers will not, without reasonable and probable cause, conduct themselves in a manner calculated to destroy or seriously damage the relationship of trust and confidence between employer and employee. This pervading obligation has been judicially expressed in words varying somewhat, but none of the variations could be significant for the present case. The foregoing wording is taken from the judgment of Sir Nicolas Browne-Wilkinson P in the Employment Appeal Tribunal in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, affirmed by the English Court of Appeal in [1982] ICR 693 and described in 16 *Halsbury's Laws of England*, 4th ed Reissue para 44, n 3, as the *locus classicus*.

In his dissenting judgment Richardson J took a different view. In redundancy cases he said the issue of substantive justifiability simply turns on the question of whether or not there was a genuine redundancy situation. He then went on to say at p 5:

> Leaving aside for the moment the procedural fairness aspect of unjustifiability, it follows that if the dismissal is for genuine redundancy reasons the employee is entitled to payment on termination of such amount as is due under the employment contract

or any special applicable statutory provision. No more and no less. It is not reduced if the employer is poor or increased if the employer is rich or varied according to the special circumstances of the employee.

The Judge listed 11 principles that he considered applied to redundancy cases. One of these was to the effect that imposing obligations on an employer to make redundancy payments where the contract is silent on the issue would run counter to the statutory intent of the Employment Contracts Act 1991. He considered that it was for the parties to negotiate the content of the contract, and thus create enforceable rights and obligations between them.

At p 19 of his judgment Richardson J sums up the difference between his approach to the issue and that of the majority of the Court. He says:

> Since preparing the substance of this judgment I have had the opportunity of reading the draft judgments of other members of the court. A crucial point which divides us is, as Casey J has put it, whether the implied obligation to preserve the relationship of trust and confidence between employer and employee can extend to require payment of compensation when none has been provided for in the employment contract. For the reasons given I consider that any extension of that kind requires legislative authority; and, indeed, that the Employment Contracts Act contemplates that, as with other elements of the contractual arrangements between employer and employee, any redundancy provision on termination of the employment contract is a matter for negotiation and agreement between the parties. Any judge will be conscious of the inequality of bargaining power in the negotiation of contracts in some employment situations; of the vulnerability of loyal employees faced with redundancy; and, also, of the economic disincentive to expanding employment of uncertainly high redundancy costs. The social and economic policy implications of possible redundancy regimes call for careful analysis. The imposition of redundancy obligations, where the parties have not agreed under their contract for any such provision, and the establishment of quantification criteria are surely for the legislature not for the courts.

The decision of the majority however was that an implied term about redundancy could be read into an employment contract that did not mention it. Like Richardson J, Gault J did not consider that this was the proper approach although in practical terms he too was of the view that the matter should be referred back to the Tribunal. In his view the Tribunal should reconsider the whole matter and not restrict himself to the question of the quantum of compensation only.

There are some interesting ironies in the judgments. For instance Cooke P cites a lengthy passage from the judgment of Richardson J in *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275 and comments that although *Telecom South* was not a redundancy case he can see no sound reason why it should not apply also in such cases. In his 20-typescript page judgment dissenting from the majority, Richardson J refers briefly at the end of his judgment to what he said in the *Telecom South* case and explains that he had been dealing there with procedural fairness, but that this was not applicable in the *Brighouse* case.

Another particularly interesting incidental point in the judgment of Richardson J is his reference to *Hansard* at p 17 of the typescript, for a negative purpose. To put it in its context the full paragraph has to be quoted:

> I cannot read into these dicta a charter for the Employment Court to depart from the approach taken by the Arbitration Court in the *Fabiola Fashions* case [[1981] ACT 439] and, in cases where there is no contractual redundancy provision and the dismissal is for genuine redundancy reasons, require payment of compensation on the court's assessment that fair and reasonable compensation is called for. Nor can it be said that the enactment of the personal grievance provisions of s 27 of the Employment Contracts Act 1991 was a legislative endorsement of the interpretation given to the expression "unjustifiably dismissed" in its predecessor (s 210 of the Labour Relations Act 1987) by the then Labour Court post *Hale*. Mere repetition of a legislative expression cannot warrant any inference of that kind and in the 190 pages of Hansard on the Employment Contracts Bill (Vol 514 of New Zealand Parliamentary Debates) there is no discussion of the test of unjustifiable dismissal, no reference to *Hale* and no mention of the interpretation by the courts of the previous legislation.

This is interesting for three reasons. The first is that it is an example of using *Hansard* not as a guide to what Parliament intended in a piece of legislation, but for the opposite argument of what Parliament did not intend simply because of there being no express positive statement. Members of Parliament may of course have simply overlooked it through ignorance (a not unreasonable supposition!), or they might simply have taken it for granted and seen no point in arguing about it since they were all agreed. The second point is that although this *Hansard* point may have been raised by Counsel, none of the other judgments refer to it, but Richardson J states he went to the trouble of perusing some 190 pages of *Hansard*. The third point is allied to the second. Richardson J has indicated on a number of occasions that he looks at background material, including *Hansard* as a matter of course. Most recently, in an address to the New Zealand Society of Accountants on 4 November last year for instance he said that while only rarely did he discuss such additional material in his judgments he felt it important to understand what those close to the scene, as he described it, had in mind. He added that for himself he certainly read that extra material as a matter of course. But if the Judge does this as a matter of course do counsel have a corresponding duty to check also; and does it follow then that it is necessary for any worthwhile law library to subscribe to *Hansard*?

In this case His Honour's reference to *Hansard* may only have been dealing with a make-weight argument, but that might not always be true. The problem that it raises could therefore turn out to be a real one for counsel in the future.

P J Downey

Case and Comment

Solicitor undertakers beware!

The serious nature of a solicitor's undertaking is brought home by *Burbery Mortgage Finance and Savings Ltd (in receivership) v O'Neil and others* [1994] BCL 1750.

Williamson J began his judgment in this case by saying:

> A solicitor's undertaking is a solemn assumption of responsibility. Its application to the solicitor's partners, and the significance of any special relationship with the person to whom the undertaking is given, are the principal questions raised by this case. Essentially the dispute is between innocent parties who are endeavouring to avoid bearing a loss occasioned by the unwise or dishonest activities of another.

(The punitive-disciplinary jurisdiction of the High Court over solicitors as officers of the Court has recently been dealt with: see *Countrywide Banking Corporation v Kingston* [1990] 1 NZLR 629 at 637; *NatWest Finance v Bryant* [1989] 1 NZLR 513; *AGC (NZ) v East Brewster Urquhart* [1992] 2 NZLR 167 at 171. It is not the purpose of this note to traverse these cases, which were duly considered by Williamson J in the case under review).

The facts of the *Burbery* case were, in brief, these: S, a solicitor, who was at all material times a partner, with four others, in a firm of barristers and solicitors (O'NA), obtained a loan of $787,500 from the plaintiff lending institution (BMF) to assist him in the purchase of a commercial property. In fact, S later left the firm. It also appeared that, from time to time, there had been dealings between BMF and O'NA and, in particular, that instructions had been given to O'NA to prepare mortgage documents on behalf of BMF.

The advance was made on the footing of a 1987 valuation stating the property to have a value of $1.05m. The purported price paid by S was $1.1m but, in reality, the price paid was only $765,000. When, in July 1988, BMF instructed O'NA to prepare the mortgage documents it required that the amount of the mortgage must not exceed 75% of the lowest cash consideration for which the property was to be transferred. In addition, in the event of the valuation being more than six months old, the valuer's authority for BMF to use it and the valuer's confirmation that the value of the property had not reduced were required. Around the time when settlement took place, the value of the property was estimated by the valuer to be not more than $800,000.

A solicitor's certificate of compliance or undertaking was signed and completed by S, as principal in O'NA, and it recorded O'NA as solicitors on the record and it expressly referred to BMF's instructions. There was an accompanying letter, signed by S, which specifically referred to the 1987 valuation. There were no references to any problems associated with that valuation or to the fact that the valuer had stated to S that the $1.05m valuation was no longer realistic. In the events which happened, BMF claimed in essence that the defendants, practising as O'NA, had breached this undertaking because the loan value had exceeded 75% of the cash consideration and in not obtaining the valuer's confirmation that the value of the property had not been reduced. BMF claimed that, had the correct information as to the value of the security had been advanced, the total amount of the loan would have been only $300,000 and not $787,500. (They were seeking a determination as to liability on the basis that an exact determination of the quantum would be the subject of a separate hearing).

S's partners deposed that they had no prior knowledge of this particular transaction or of the undertaking that S had given – and had clearly broken. The ordinary business of O'NA did not, they claimed, include acting for its partners in respect of their own entrepreneurial activities such as the present, or acting for lenders of moneys to any partner for such activities. While they were aware that S was engaged in entrepreneurial activities, it was said, they were unaware of the extent or speculative nature of them. They took the view that they should not be responsible for the loss suffered by BMF because the latter was aware that the moneys were being advanced to S personally and that S was acting as solicitor for himself and for BMF.

Williamson J stated that, before the Court could enforce any undertaking, it had to be satisfied that that undertaking had been given by the firm of solicitors and not in a personal capacity. In his view there was no doubt here that BMF gave O'NA instructions and that BMF received the undertaking from O'NA. Not only were the vital documents framed in that way but also all the correspondence in relation to the loan was between BMF and O'NA.

The first question was, given that S did not have his partners' express authority to sign the undertaking, did he have an apparent or ostensible authority, "given the fact that his multiple role as purchaser, borrower and principal of the instructed firm of solicitors was known to BMF"? Williamson J, having referred to *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257, at 272 and *New Zealand Tenancy Bonds Ltd v Mooney* [1986] 1 NZLR 280 at 283,

turned to a consideration of the seminal decision of the English Court of Appeal in *United Bank of Kuwait Ltd v Hammoud* [1988] 1 WLR 1051; [1988] 3 All ER 172.

In that case E was a salaried partner in an English firm of solicitors. Without the knowledge of the two equity partners, E falsely represented to the United Bank that moneys belonging to H would shortly become under his firm's control. Without any actual authority, E undertook, purportedly on the firm's behalf, to transfer the money to H's account with the bank. (The bank was unaware that E had no authority to act as he had, so that the exception to the United Kingdom equivalent of s 8 of the Partnership Act 1908 was inapplicable). Relying on the security of the undertaking the bank made a loan to H. The loan was not repaid, whereupon the bank called on the other partners in the firm to make good the undertaking. E knew that the undertaking was not backed by funds or any form of security. The question arose whether the giving of the undertaking by E was an act for carrying on in the usual way the business carried on by the firm. Evidence was given by a former President of the English Law Society to the effect that solicitors nowadays regularly gave undertakings in the ordinary course of their business and that this was often regarded as a key feature of the service they provide. It was held that an undertaking of the kind E had given fell within the ordinary business of a solicitor where there was, as in that case, an underlying transaction of a solicitorial nature and where the funds were, or might reasonably be expected, to come under the control of the firm in whose name the undertaking was given. The transaction had to be looked at objectively, irrespective of its true nature. It would have appeared to a reasonably prudent banker that there was an underlying transaction of a solicitorial nature between the firm and H in the course of which the undertaking had been given. The bank was considered to have succeeded in discharging the onus lying on it of proving that E had ordinary authority to bind his partners. The Bank was entitled to assume that admitted solicitors of good character whose statements did not require that degree of confirmation that might otherwise be appropriate. Consequently the equity partners were held to be liable on the undertaking.

In the light of this decision, Williamson J held that, taking an objective view, S had ostensible or apparent authority. He said:

> In this case the documents and letters from [O'NA] to [BMF] indicated that [S] had authority to act on behalf of the firm. The transaction in which the firm was engaged was related to the purchase of a property involving the consequential transfer of the title and registration of a mortgage, being work normally carried out by solicitors. The monies advanced were under the control of [O'NA] and placed in its trust account. There was nothing in the loan application or accompanying documents or [S's] conduct which would have alerted [BMF] to the possibility that [S] would be acting otherwise than in accordance with authority from [O'NA].
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> Questions of degree in relation to problems such as these must always arise. The objective standard of reasonableness is not a precise one but rather one to be determined in the context of the entire factual background. When the tests described above are applied to the facts of this case, I am satisfied that [BMF] haas shown not only that an undertaking was given by [O'NA], but also that the undertaking was incorrect and that [S] had apparent authority to give such an undertaking.

It was then necessary to pass to the matter of liability under s 13 of the Partnership Act 1908. It states:

> Liability of the firm for wrongs — Where by the wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Counsel for the defendant partners had contended that BMF's instructions had been to S personally and not to O'NA. He argued (i) that these words should receive a narrow construction and that the transaction under which S was buying the property was not one within the ordinary course of business of O'NA and (ii) that acting for any of its partners in entrepreneurial activities was not part of O'NA's partnership business.

Williamson J considered the question to be whether or not S was acting "in the ordinary course of business of the firm", referring to *Estate Realties v Wignall* [1992] 2 NZLR 615 at 633. He declined to accept counsel's argument for the same reasons that had been canvassed in relation to S's apparent authority. He held that:

> The relevant transaction in which [S] was acting at the time of giving the undertaking was one involved with the applying to a lending institution for monies for a client and the preparation of the necessary security documents along with the certificate or undertaking that that work had been carried out. In my view such work is and was in the ordinary course of the business of solicitors and, in particular, of [O'NA]. I am satisfied that [S] was acting in the ordinary course of the firm's business at the time when he gave the certificate. Accordingly, despite the fact that they did not give him any express authority, his co-partners would be liable in terms of s 13.

The defendants were, therefore, each held liable to compensate BMF for its proved loss consequent upon the failure to comply with the undertaking. As the Court observed, in dealing with a case of this nature, it is impossible not to feel some measure of sympathy for the other partners in O'NA as they were now having to face a loss occasioned by S's entrepreneurial activities. Nevertheless there was "no escape from the fact that [O'NA] clothed [S] with apparent authority to act as a solicitor in carrying out this work. He completed a certificate on their behalf to the effect that certain requirements had been met when they had not."

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Some thoughts on the Planning Tribunal's role in resource management

By Judge R J Bollard, Planning Judge

The Resource Management Act 1991 is claimed to be a progressive piece of legislation. The other view is that it is the last gasp of social engineering through planning control; and it gives to planners, through the extent of its discretionary provisions, its openness, even greater powers of interference than before with what used to be called property rights. In this article Judge Bollard explains that the emphasis of the Act is sustainable management. As the Judge concludes the true potential of the Act is yet to be realised. While some may see this as a promise others may well see it as a fearsome threat.

Perhaps it is understandable that a Planning Judge might pause to reflect upon issues of general direction and progress in resource management, as viewed after nearly seven years of judicial observation and experience. Naturally, one must register the usual caveat that comments ventured are personal, without representing any view that the Tribunal itself might reach in any case after due argument.

The New Zealand Bill of Rights Act 1990 has graphically shown that no measure of an Act's importance can be taken merely from its size. Even so, the Resource Management Act 1991 is distinctive as the largest single piece of legislation thus far enacted. Its complexity is evident enough on cursory perusal. Size aside, its claim to first rank significance is founded on its impact and influence upon society – the nature of that impact and influence being centred on the Act's purpose of sustainable management.

Part II of the Act

The concept of sustainability was not originated by those responsible for the Act's compilation.[1] Nevertheless, the concept is commonly understood to have been imported domestically as a "world first", subject to refinements appropriate to local conditions and aspirations. Part II embraces the Act's purpose of promoting sustainable management set out in s 5, along with significant supporting provisions (ss 6 to 8). The latter, however, are to be invoked and applied in pursuance of the Act's purpose rather than in counterbalance to it.

Critics have claimed that Part II contains no more than a pot-pourri of general considerations. The contention is, in turn, that a decision-maker may simply select at random any preferred outcome from the (often wide) spectrum of views advanced by planning consultants and other experts. Such a notion, it must firmly be said, fails adequately to account for the seriousness with which the Tribunal approaches its judicial task in hearings before it. It also indicates a mistaken impression of how the Act is intended to operate in practice. The language of the legislation is characterised by what has been described as "deliberate openness",[2] thus reposing in the decision-maker the responsibility of determining how best to promote the Act's purpose in the particular circumstances. In other words, with sustainable management as the cornerstone, the task of ascertaining the route for determining the individual case is entrusted to the decision-maker, without introduction of superfluous constraints.

Obviously a council, or the Tribunal on appeal, is bound to weigh, in the course of its reasoning, the various aspects of Part II shown by the evidence to bear relevance. More than this, the decision must be coherent against the background of relevant statutory considerations, duly invoked and applied. In essence, the objective is for the parties concerned and, indeed, the wider public (remembering the Act's public law character) clearly to perceive how and why a particular result is reached.

On occasion, the Tribunal encounters the type of case requiring judgments to be made on present and future aspects, bearing not just on likely physical effects but on other criteria related to public well-being (including cultural needs and concerns). Looked at in vacuo, one might be forgiven for thinking that an element of crystal-ball gazing is involved. Yet, in practice, the "wider considerations" tend to manifest themselves sufficiently straightforwardly for sensible rationalisation to occur. The scepticism of some that s 5 of the Act would not be capable of producing meaningful consistency in practice because of its being "too general" has had little more substance than the fear that some had over ss 3 and 4 of the 1977 Act. As with the sections under the former Act, s 5 cannot be applied in isolation.

The Resource Management Amendment Act 1993 has confirmed the primacy of Part II of the principal Act by stipulating that the regard to be paid to the various matters listed in s 104(1) is subject to Part II. In having regard to the listed matters, the provisions of Part II must ever be borne in mind and applied as appropriate, so that the need for the determination of the case to accord with the Act's purpose is met. At this point in time, the degree of insight into the meaning and scope of s 5 (approaching the section both

individually and in association with other sections of Part II), while gathering momentum, is far removed from the ultimate. Perhaps, indeed, the section is one of those statutory provisions that is best left to explain itself by continual application in practice, rather than by any attempts at exhaustive analysis. (See, however, the detailed article of B V Harris (1993) *Otago Law Review* 51.)

Some cases, it may be observed, have little or no sustainable management significance – see, for instance *Noel Leeming Appliances Ltd v North Shore City Council* (No 2) (1993) 2 NZRMA 243 and *Kaimahi No 1 Partnership v North Shore City Council* (Decision No A37/944, 17 May 1994). In effect, the outcome is not dependent upon Part II considerations. On the other hand, in these and other cases the need to maintain confidence in a district plan may very well be important in upholding or fostering some policy or directional thrust which the plan propounds. Hence, while consent to a discretionary or non-complying activity in a particular case may not, in itself, be likely to hinder achievement of a plan's broader aim, nevertheless, in having regard to the relevant rules, objectives and policies, one should not overlook that the underlying basis for their existence is to promote the Act's purpose. Any question of maintaining the plan's integrity will both arise and fall to be considered in the light of all the circumstances, with the importance of and corresponding weight to be attached to the relevant provisions of the plan being assessed and determined in the process.

Resource management decisions to date have been subjected to close scrutiny by legal commentators and practitioners, council officers and others. While very significant dicta have issued from the High Court (particularly in the Full Court judgments in *Batchelor v Tauranga District Council* (1993) 2 NZRMA 137 and *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 and in the notable judgment of Greig J in *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70, much elucidation has predictably been at the hands of the Tribunal. The volume of decisions issued by each of the Tribunal's five divisional units since the Act's introduction speaks for itself. Generally, decisions are longer and more complicated than under the former Town and Country Planning Act 1977, although that need not be seen as an adverse trend. Inevitably, the forging of new ground has involved creative effort, with commensurately more written output.

Various cases have come before the Tribunal requiring consideration of s 8 of the Act (the Treaty provision). Recent decisions of the High Court and the Tribunal have collectively contributed to a clearer understanding of the section's import and effect.[3] A distinction has been drawn by the Tribunal between a council's duty to consult with Maori in preparing a district plan, in contrast to its manner of dealing with a resource consent application made by a third party up to the point of hearing the case. In *Ngati Kahu & Others v Tauranga District Council* [1994] NZRMA 481, a council's duty to consult with tangata whenua communities in the course of formulating a new plan or plan change was considered in some depth. Hopefully, the decision, at least for the time being, will serve as a useful guide on the consultation aspect, given that many councils are currently preparing and promoting initial plans under the 1991 Act.

Transitional plans

The difficulties in dealing with transitional plans, prepared and promulgated under the old legislation, have been well recognised. In *K B Furniture Ltd & Others v Tauranga District Council* (1993) 2 NZRMA 291, a pragmatic approach was called for by Thorp J to assure workability. But the weight to be attached to a proposed plan, by contrast with a transitional plan which the former is intended eventually to replace, is far from clear. The Tribunal may be expected gradually to build a pattern of approach as and when a wide selection of matters affecting proposed plans are taken on appeal in the next year or so. At this stage, the discussion of the topic in *Hanton v Auckland City* [1994] NZRMA 289 at 303 et seq warrants notice.

At the risk of disappointment through over-optimism, careful investigation and innovative thinking may be expected to be applied in the preparation of new plans beyond the transitional stage. Desirably, the past will prove instructive, with resort to remedial or mitigatory measures becoming less prevalent as forms of approach to resource management, by contrast with the technique of avoidance. The formulation and adoption of well-researched courses of action, able to be planned and implemented comparatively straightforwardly and carrying attractive cost benefits, will be important. Equally important will be the accurate identification of early warning indicators of adverse patterns or trends – remembering always that, without timely intervention, overtly entrenched environmental degradation or other detrimental change generally occurs, accompanied by significant financial implications in the face of public opinion and concern.

Potential of the Act

In a sense, the Act may be regarded as an intended blueprint for enlightened management of resources into the next century. For a country blessed with so much natural wealth, shared amongst so modest a population, due effort is contemplated in seeking to pass on a suitable legacy to succeeding generations, while providing reasonably for present day needs and aspirations. Few would disagree that the Act's true potential is yet to be realised. As with the former Act in its earlier years, case law is steadily advancing in the maturation process. □

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1 See, for instance, World Commission on Environment and Development, *Our Common Future* (1987) (the "Bruntland Report"); also, the Rio Declaration on Environment and Development, adopted at the United Nations Conference held at Rio de Janeiro in June 1992.

2 Per Greig J in *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 at 86.

3 Refer, in particular, to *Quarantine Waste NZ Ltd v Waste Resources Ltd* (High Court, Auckland, CP 306/93, 2 March 1994, Blanchard J); *Worldwide Leisure Ltd & Anor v Symphony Group Ltd & Anor* (High Court, Auckland, M 1128/94, 22 November 1994, Cartwright J); *Gill v Rotorua District Council* (1993) 2 NZRMA 604; *Haddon v Auckland Regional Council* [1994] NZRMA 49; *Ngatiwai Trust Board v Whangarei District Council* [1994] NZRMA 269; *Sea-Tow Ltd v Auckland Regional Council* [1994] NZRMA 204; and *Hanton v Auckland City* [1994] NZRMA 289.

In search of a logic: s 5 of the Resource Management Act

By Kerry James Grundy, Department of Geography, University of Otago

This article is written by a geographer. It is a critical response to an address by the Minister for the Environment given in Wellington on 7 October 1994 to the Resource Management Law Association Conference. The article focuses on the meaning of the term "sustainable management" in s 5 of the Resource Management Act. The author agrees with the opening part of the Minister's address in seeing the Act as intended to ensure environmental outcomes, but he is critical of the remainder of the Minister's speech. He analyses what he sees as misconceptions, inconsistencies, illogicalities, and contradictions of the attempt in the legislation, and the Minister's speech, to reconcile market liberalism with environmentalism. The legislative wording and the very concept of sustainable management, the author maintains, require increased intervention and more comprehensive planning.

Introduction

The address delivered by the Minister for the Environment to the Resource Management Law Association Conference in Wellington on October 7 has been published by the Ministry for the Environment in order to stimulate discussion and solicit comment. The following analysis will critically examine the substance of the Minister's address, in particular his deliberations on s 5 – the purpose of the Resource Management Act. The analysis will reveal the contradictions and illogicalities inherent in attempting to reconcile market liberalism with the concept of sustainability. It will show that the Minister's attempts to marginalise the socio-economic and cultural effects of resource use are ideologically driven rather than based on reason. Furthermore, the analysis will illustrate that this approach to s 5 is contrary to other specifications within the Act, contradictory to national policy statements on the environment, and inconsistent with international initiatives on reconciling developmental strategies with environmental concerns. For sake of clarity in presenting my argument I reproduce below the legislative wording of s 5:

> 5. Purpose – (1) The Purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity for air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Interpretation

The Minister, in his address, distinguishes between a "conservative" and a "progressive" approach to the interpretation of s 5. He states:

> The conservative position in this debate is that section 5 is all about balancing socio-economic aspirations with environmental outcomes. The progressive view . . . is that the purpose of the Act is to secure a particular environmental ethic [outcome] – sustainable management. The debate turns on whether the word "while" in section 5(2) invites the antecedent matters to be balanced against those that follow; or whether the matters in sub-paragraphs (a), (b) and (c) must be secured whatever the activities being contemplated (p 3).

The Minister supports the second interpretation. For example, he states: "The definition of sustainable management in relation to a resource makes it clear that there are *three* matters which *must* be secured. If it can secure them, then the use will be acceptable" (p 7 – author's emphasis). Conversely, if it cannot secure all three it will not be acceptable. He uses three recent Planning Tribunal decisions from Judge Kenderdine to support this view. The Judge is quoted as saying:

> The provisions of s 5(2) (a), (b) and (c) may be considered cumulative safeguards which exist in order to ensure that the land resource is managed in such a way, or at such a rate which enables the people of the community to provide for the various aspects of their social wellbeing and for their health and safety. They are safeguards which must be met before the Act's purpose is fulfilled (*Foxley Engineering* W12/94).

> If we find that one of these safeguards is unlikely to be achieved then the purpose of the Act is not fulfilled (*Plastic and Leathergoods* W26/94).
>
> The promotion of sustainable management has to be determined therefore in the context of these qualifications which are to be accorded the same weight (*Shell Oil* W8/94).

Now, I must state at the outset that I agree with this interpretation. Rather than a balancing of developmental aspirations with environmental outcomes (which is the historical perspective) it introduces the progressive notion of an integration of these concerns. Development can only proceed if it is compatible with the environmental outcomes stipulated in sub-paras (a), (b) and (c). In other words, people and communities can provide for their social, economic and cultural wellbeing and for their health and safety only by ensuring that the reasonably foreseeable needs of the future are met, the ecological base for their wellbeing is sustained, and adverse effects of their activities are avoided, remedied or mitigated. It represents an integration of economic, socio-cultural, and ecological concerns. This is how it shoud be.

Misconceptions

At this point, however, the Minister's logic deserts him and major contradictions and inconsistencies appear in his analysis. Two fundamental misconceptions are involved. Firstly, he recognises only biophysical or ecological imperatives in sub-paras (a), (b) and (c). This is clearly erroneous. He also argues that any inclusion of socio-economic or cultural considerations in (a), (b) or (c) will compromise biophysical or ecological outcomes. This too is erroneous. Let me explain.

With regard to the inclusion of socio-economic and cultural issues in sub-paras (a), (b) and (c) let us look first at sub-para (a) – the requirement to sustain the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations. This is clearly an equity issue. Intergenerational equity, like contemporary equity, is a socio-economic and cultural-political issue and cannot be addressed solely by consideration of biophysical or ecological concerns. It requires a socio-political judgment on what is essentially an ethical issue – the foreseeable needs of future generations. There can be no dispute that socio-economic and cultural concerns are involved in sub-para (a).

The consideration of such socio-economic and cultural issues, however, will in no way compromise the biophysical or ecological imperatives contained in s 5. They are, in fact, complementary. Biophysical and ecological resources, to meet the foreseeable needs of future generations, must be managed sustainably. This implies a non-deterioration of renewable resources and essential ecological processes and a non-disruptive transition from non-renewable resources to alternatives. It is, in effect, the quintessence of sustainability.

Let us next examine sub-para (c) – the requirement to avoid, remedy or mitigate any adverse effects of activities on the environment. Here the Minister insists on considering only the "physical" effects of resource use on the biophysical environment, supposedly for fear of compromising biophysical or ecological outcomes by introducing "a balance or trading-off of the sustainable management of natural and physical resources" (p 8).

To begin with, the Minister's use of the term "physical effects" (p 7) cannot be supported by the legislative wording. Nowhere in the statute is the word "physical" used in conjunction with "effects" – not in s 5 nor in the definition of effects. This is purely a fabrication on the part of the Minister.

Furthermore, the *meaning* of environment, as stated in Part II – Interpretations and Applications, clearly and categorically includes people and communities, amenity values, and the social, economic, aesthetic and cultural concerns of people and communities, irrespective of what semantic contortions are used to argue otherwise. Again, for sake of clarity, I reproduce below the statutory definition of environment:

> "Environment" includes:
> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) All natural and physical resources; and
> (c) Amenity values; and
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

It is indisputable, therefore, that s 5(2)(c) requires that adverse effects on people and communities and the social, economic, aesthetic and cultural conditions of people and communities must be considered when deciding whether a resource use is serving the purpose of the Act. And this is how it should be. The consideration of such issues is a necessary precondition to ensure a socially sustainable outcome. It provides a means of ensuring that a resource use is not detrimental to the community in which it takes place. For instance, a development that may be advantageous to a foreign concern or to a small group nationally, but is of no benefit or even detrimental to the local community can be avoided. It is concerned, as it should be, with contemporary equity. If the purpose of sustainable management includes the consideration of inter-generational equity, as it does under sub-para (a), it is logically and ethically inconsistent to deny the consideration of contemporary equity.

Furthermore, the inclusion of such concerns enables the application of social rationality to resource decisions. For instance, if the social effects of resource use are to be excluded from consideration in s 5(2)(c), where is the rationale to deny consent to the location of a pornography outlet adjacent to a primary school or an abortion clinic next to a Catholic Church? There are no adverse biophysical or ecological effects upon which to deny such developments. The only grounds to do so are by consideration of the adverse social effects of such proposals on the community. It is absurd to deny the validity of such considerations.

Two recent decisions by the Planning Tribunal support this position. In both *Shell Oil NZ v Wellington City Council* (W057/92) and *BP Oil NZ Ltd v Auckland City Council* (A153/92) appeals

challenging the refusal of resource consents for the establishment of service stations in residential areas were dismissed because of the adverse effects these proposals would have on the *amenity values* of the neighbourhoods. The decisions were based on the definition of the environment enabling consideration of adverse effects of resource use on amenity values and the requirement under s 7(c) to have particular regard to the maintenance and enhancement of amenity values. Clearly, these decisions were based on consideration of socio-economic effects of landuse on people and communities not on the effects of the proposals on the natural or ecological environment.

Inconsistencies

In addition, if the cultural effects of a resource use are not to be considered in achieving the purpose of sustainable management how can the matters in s 6(e) – the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga – be provided for? How can s 8 – the principles of the Treaty of Waitangi – be reconciled with the exclusion of the cultural effects of resource use from s 5(c)? For example, there may be no biophysical or ecological rationale to deny subdivision of a Maori burial site. Such a development could only be denied by consideration of adverse cultural effects of the proposal.

If s 5(2)(c) is to consider only adverse biophysical and ecological effects of resource use, how can particular regard be directed to the maintenance and enhancement of amenity values and the recognition and protection of the heritage values of sites, buildings, places or areas, as required in s 7? These are socio-cultural issues and require the consideration of socio-cultural effects of resource use if they are to be provided for in the purpose of the Act. Once again, to deny such considerations is absurd.

Not only is the exclusion of socio-economic or cultural considerations from s 5(c) perverse from an operational perspective and contrary with the other sections in Part II, it is also inconsistent with the rest of the Act.

For example, how can the exclusion of the consideration of social, economic and cultural effects from s 5(2)(c) be reconciled with the requirement in the Fourth Schedule to consider, when preparing an assessment of effects on the environment:

> (a) any effect on those in the neighbourhood, and where relevant, the wider community including any socio-economic and cultural effects: [and]
> (d) any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural, or other special value for present or future generations.

If, as the Minister claims, s 5(2)(c) excludes the consideration of the socio-economic effects of resource use, then why consider them when preparing an assessment of effects on the environment? This surely lacks any consistent rationality.

Furthermore, the Second Schedule lists as matters that may be provided for in policy statements and plans:

> Any matter relating to the management of any actual or potential effects of any use, development, or protection . . . on –
> (a) The community or any group within the community (including minorities, children, and disabled people): [and]
> (c) Natural, physical, or cultural heritage sites and values, including landscape, land forms, historic places, and waahi tapu.

We know from ss 30 and 31 that policy statements and plans must serve the purpose of the Act as defined in s 5. If s 5 excludes consideration of socio-economic and cultural effects of resource use then why include them as matters that may be provided for in policy statements and plans? Once again, the exclusion of these considerations from s 5(c) is clearly inconsistent with the rest of the Act.

Illogicalities

With regard to the Minister's contention that the inclusion of such socio-economic and cultural effects in s 5(2)(c) will result in a compromising of biophysical or ecological outcomes this too is untenable. Only *adverse* effects of activities can be considered under s 5(2)(c). There is no way, therefore, that the potential beneficial socio-economic effects of a proposal can be used as a balance or trade-off with biophysical or ecological outcomes.

Even under the hypothetical circumstances outlined by the Minister in his example to support his contentions there need be no compromising of biophysical or ecological outcomes if consistent logic is applied. This is because, in the Minister's own words, sub-paras (a), (b) and (c) are "conjunctive". Let me use the Minister's own example to illustrate this point. To prevent misunderstanding, I reproduce the full text of his argument. He states:

> Suppose I am involved in the unsustainable harvest of a native crop (which is in public ownership), and suppose I make an application to continue that harvest. Suppose, too, that from the proceeds of that unsustainable harvest I have built a community of people dependent on it. I present my application, only to be told that I must avoid, remedy or mitigate the adverse effects of my harvest on the environment (amongst other things). My lawyer jumps to his feet and points out that in his interpretation of the definition of the word "environment", there are social and economic conditions which affect people and communities (as constituent parts of eco-systems) and that the Act therefore requires that I should mitigate any adverse effect on my unsustainable harvest (I take this to mean "of" my unsustainable harvest – pp 8, 9).

I assume that his point is that if this hypothetical unsustainable activity is refused consent to continue then this would have an adverse effect on people and communities and their economic and social wellbeing. The Minister seems to have overlooked the fact that if the activity is unsustainable it is ultimately going to have adverse effects on people and communities whatever the outcome of the consent process. It also seems to have gone unnoticed that

existing uses are considered as of right under ss 10 and 10a. Even so, leaving aside these considerations, the argument still fails to stand up to scrutiny.

For an activity to take place it must, as the Minister himself stresses in his address, satisfy *all three* requirements in sub-paras (a), (b) and (c). As the Minister states:

> whilst any regime has to accept that people have to be able to provide for their social, economic and cultural wellbeing (in other words to get on with their lives) they must do so in a way that is consistent with *all* the matters referred to in section 5(2) (a) and (b) and (c). They are conjunctive (p 6 – author's emphasis).

Clearly, if consent is not forthcoming for the hypothetical activity it does not satisfy one or more of the sub-paragraphs, presumably in this instance if it is unsustainable, sub-para (a). Therefore, it cannot proceed and the adverse effects of this decision on the socio-economic or cultural conditions of people and communities cannot be weighed against, or used to compromise the biophysical or ecological imperatives contained in (a), (b) and (c). This would be true of any existing activity re-applying for consent. Unless the resource use satisfies all three requirements in (a), (b) and (c) it will not proceed.

The rationale for resource use is to provide for people's social, economic and cultural wellbeing. Yet this must be achieved by ensuring the outcomes specified in (a), (b) and (c). The requirement for the avoidance, remedying or mitigation of adverse socio-economic and cultural effects on people and communities resulting from resource use is logically consistent with the provision of their social, economic and cultural wellbeing. In addition, as previously shown, if (a), (b) and (c) are conjunctive (or in the words of Judge Kenderdine, cumulative) the consideration of these matters cannot be used to compromise the biophysical or ecological requirements in s 5. There is no "meaningless circularity" involved in this interpretation and requires no "politicisation of the Judiciary" as claimed by the Minister. It is, in fact, straightforward and requires only the consistent application of logic.

Contradictions

If there is a genuine, holistic approach to the resource management legislation that includes the integrative consideration of social, cultural, economic and ecological concerns there is no logical difficulty with interpreting s 5. There need not be problems of balancing or compromising biophysical or ecological outcomes.

It is when attempts are made, on ideological grounds, to exclude socio-economic and cultural considerations from resource use that illogicalities and contradictions occur. This is because it is fundamentally irrational to do so. Social, cultural and economic concerns are intimately part of any resource use. Indeed, social, economic and cultural factors are involved in the very definition of a particular feature of the environment as a resource.

This perception has been supported by an increasing international recognition, over the last two decades, that the environmental effects of resource use cannot be divorced from the socio-cultural-economic fabric of which they are an integral part. For example, the major theme of both the WCED report "Our Common Future" (1987) and the proceedings of the UNCED Conference (1992) "Agenda 21" was that the concept of sustainable development required fully integrated social, economic and environmental policies to be applied at local, regional, national and international levels. Both of these documents have been endorsed by the New Zealand Government and promoted by the Ministry for the Environment.

"Agenda 21", perhaps the most comprehensive international statement yet on environmental protection and remedial strategies, devoted eight chapters to the social and economic dimensions of sustainable development. Chapter 8 is of particular relevance to public planning. It stated the overall objective of integrating environmental and development in decision-making to be: "to improve or restructure the decision-making process so that consideration of socio-economic and environmental issues is fully integrated . . ". It went on to say:

> Governments should . . . improve the processes of decision-making so as to achieve the progressive integration of economic, social and environmental issues in the pursuit of development that is economically efficient, socially equitable and responsible, and environmentally sound (p 94).

Furthermore, in a specific reference to planning and management systems it advised:

> Governments should review the status of the planning and management system and, where necessary, modify and strengthen procedures so as to facilitate the integrated consideration of social, economic and environmental issues (p 95).

These expositions point to major contradictions in the stance adopted by the Minister for the Environment in his address regarding the resource management legislation. Moreover, his stance on the resource management legislation is, paradoxically, at odds with his own Ministry's "Environment 2010 Strategy". This document devotes substantial rhetoric to the need to fully integrate environmental, economic and social concerns in development strategies.

For example, in the "Foreword", signed by the Minister himself, it states:

> The strategy is linked to the Government's "Path to 2010". It promotes integration of environmental, economic and social policies and strategies . . . The 1992 Rio "Earth Summit" highlighted the need to fuse economic, social and environmental policies at local, national and international levels (p 3).

Furthermore, the Strategy has, as the first priority on its Environmental Management Agenda,

> the integration of environmental, social and economic factors into the mainstream of decision-making in all sectors, at all levels (p 48).

These policy statements are irreconcilable with statements made by the Minister in regard to the Resource Management Act. For

example, he states in his address: "The Act is not designed as a social planning statute". It is "first and foremost an environmental statute" (p 2). He goes on to say:

> We must not ignore the fact that the definition [of the environment] is an "inclusive" one and that social and economic conditions are only part of the environment where they affect, or are affected by, the other components of the environment (ie resources, ecosystems etc) [whatever this means]. Social and economic conditions on their own are not part of the environment and it is therefore, incorrect to say that section 5(2)(c) requires adverse effects on social and economic conditions to be considered (p 8).

These semantic distortions are a far cry from the "integration of environmental, social and economic factors into the mainstream of decision-making in all sectors, at all levels" advocated in the "Environment 2010 Strategy".

Conclusion

The Minister's address exhibits the contradictions and illogicalities inherent in attempting to reconcile market liberalism with environmentalism. The fundamental difficulty he encounters is that whilst the political intent (underpinned by neo-liberal ideology) of the resource management legislation is to limit intervention in resource allocation decisions and to curtail the role of planning in regional and district affairs in preference to market processes, the legislative wording in general and the concept of sustainable management in particular, paradoxically, requires increased intervention and more comprehensive planning (Grundy, 1993).

Issues such as intergenerational equity, maintenance of genetic diversity, the intrinsic values of ecosystems and even the sustainable utilisation of resources are not ensured by market processes alone. They are, in fact, often conflicting. As Daly and Cobb (1989) have pointed out, the free market has no means of ensuring an optimal scale of the macro-economy relative to the ecosystems in which it operates, which is central to ensuring ecological sustainability. In addition, as Eckersley (1992) has remarked, market rationality is fundamentally incompatible with the notion of intergenerational equity. Indeed, the goal of profit maximisation encourages the liquidation or depletion of both renewable and non-renewable resources, and the movement of the capital thereby gained into new ventures, rather than the sustainable or prudent harvest over time.

Similarly, contemporary equity and market rationality are antithetical. Recent studies by the *Economist* (1994) show growing disparities between rich and poor within those countries that have most strongly promoted market liberalism (eg the United States, Britain and New Zealand). The study found, furthermore, that societies with greater inequalities experience more ill health, social stress and crime. Neo-liberal attempts to remove equity considerations from resource decisions are not only contributing to this contemporary social malaise, but are also antagonistic to the concept of sustainability promoted internationally, which properly recognises that equity must be a concern of resource use if development is to be, in the long term, sustainable (WCED, 1987; UNCED, 1992).

A meaningful and operational definition of sustainable management in line with the concept of sustainable development that has evolved globally will require a much more sophisticated and innovative approach to resource management than that dictated by neo-liberalism. The application of nineteenth century economic theory to twentieth century environmental problems is fraught with difficulties, as the Minister's address aptly illustrates. If the illogicalities and contradictions inherent in such an approach are to be avoided, the intellectual constraints of neo-liberalism must be abandoned and a more holistic and integrative approach initiated – one informed by the new ecological and social realities of the twentieth century.

The Minister states in his address to the Resource Management Law Association Conference:

> I'm . . . concerned with those who choose to use part of one sentence in the definition of "environment" to redefine totally the meaning of sustainable management [I assume here he means the inclusion of people and communities and their social, economic and cultural conditions]. Such attempts at statutory deconstruction defy logic, the ordinary meanings of words, and the ethic of the Act as a whole (p 4).

I put it to the Minister, that his stance not only defies logic, the ordinary meanings of words and the ethic of the Act, but is also at odds with the growing volume of international proclamations on the concept of sustainability and even, paradoxically, with the contents of his own Ministry's Environment Strategy. If, as the Minister concludes in his address, "perfection in environmental matters is the preserve of the manic and the obsessed" (p 10) then perhaps imperfection in logic is the preserve of the politician and the policy maker. □

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Actual consensus ad idem in contract – unnecessary but surely sufficient?

By D W McLauchlan, Professor of Law, Victoria University of Wellington

In this short article Professor McLauchlan questions some recent remarks of McGechan J concerning the objective approach to questions of contract formation.

It is an established general principle of the law of contract that an objective approach is adopted in determining questions of agreement and intention to be bound. Although the Courts will often say that consensus ad idem or a "meeting of the minds" is required for the formation of a binding contract, it is clear that an *apparent* consensus will suffice; see, for example, *Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560,567. Thus, as Blackburn J stated in the well-known case of *Smith v Hughes* (1871) LR 6 QB 597,607:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

It follows that a person will be held to have made a contractual offer if it was reasonable for the alleged offeree to believe that he could conclude a contract simply by indicating assent to the former's terms. It is irrelevant that the offeror had not the slightest intention to be bound (because, for example, the promise was made in jest) if the offeree was reasonably entitled to think that the offeror did have that intention. Similarly, a mistake by a promisor as to the terms of the contract (for example, she thinks she is buying properties X and Y, not just property X) does not prevent the formation of a binding contract where the promisee reasonably believes that the terms have been assented to.

Approach not wholly objective

It by no means follows, however, that the approach of the Courts is wholly objective and that they are unconcerned with the actual intentions or states of mind of the parties. As Blackburn J's statement in *Smith v Hughes* itself makes clear, the objective principle involves a subjective element. It requires not only that a reasonable man would believe that the promisor was assenting to the terms proposed by the other party but also that "that other party upon that belief enters into the contract with him". Where, for example, the other party knows that the promise is made in jest or that the promisor is mistaken about the terms of the contract this requirement is not satisfied and the promise cannot be enforced in its "objective" sense. A party who alleges the formation of a binding contract because a reasonable person in his position would have been entitled to infer a contractual offer can only succeed if, in addition, he subjectively understood that there was an offer (see *The Hannah Blumenthal* [1983] AC 854, 915-917, 924), although in practice this will be assumed in the absence of a challenge from the alleged offeror. (Indeed, there is much to be said for the view that "the courts are entitled to assume, in the absence of proof to the contrary, that a party's subjective understanding of a transaction corresponded with the way in which a reasonable person in his position would have understood it": Vorster, (1987) 103 LQR 274,287.)

The objective principle must also be subject to a further qualification which, one would have thought, went without saying. This is that the principle only applies in the absence of clear evidence of the actual mutual intention of the parties. That intention may be either that there is or is not a binding agreement. Dealing with the latter possibility first, it is clear, for example, that an apparently complete document which purports to be a contract will not be so where it is established by extrinsic evidence that it was not intended to be a binding agreement, either at all or until the fulfilment of a condition. Conversely, if there is proof of actual consensus ad idem and intention to be bound, there must surely be a contract regardless of what a reasonable person would infer from the parties' communications and the surrounding circumstances. Unless one is prepared to countenance the possibility of refusing to give effect to the parties' mutual subjective intentions there is simply no reason to be concerned with, let alone give effect to, objective inferences. Indeed, it has been observed that "if the mutual actual intention was that there should be a concluded contract, it would be fraudulent to deny that intent" (*Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* [1985] 2 NSWLR 309,319 per Hope JA). Thus, the fact that there is no objective consensus ad idem because, for example, there is more than one reasonable interpretation of

the obligations assumed, is irrelevant if the parties shared the same subjective understanding of the transaction. If in the famous case of *Raffles v Wichelhaus* (1864) 2 HC 906, which involved the sale of cotton "ex Peerless from Bombay" and there happened to be two ships named Peerless leaving Bombay at different times, the evidence established that both parties had the same Peerless in mind "it is clear that there would have been a valid contract, notwithstanding the objective ambiguity" (J C Smith, *The Law of Contract*, 1989, 14). See also Farnsworth, *Contracts* (2nd ed, 1990) 503-505.

A different view

Although the above observations might be regarded as relatively uncontentious, some recent statements by McGechan J in the High Court indicate a different view of the objective principle. His Honour appears to believe that the approach to questions of consensus and intention to be bound is wholly objective and that the Court is not concerned at all with the subjective intentions of the parties even though those intentions correspond.

The first indication of this view is to be found in *NZ Master Builders' Federation v Data Management Ltd* (High Court, Wellington, CP 1108/90, 19 March 1993). This case, which is noted on the main issue by the writer in [1993] NZ Recent Law Rev 442, 458-459, concerned the enforceability of an informal agreement for the long term lease of commercial premises. In the course of determining the preliminary question of consensus (whether the parties were agreed as to essential terms), as opposed to intention to be bound, his Honour found it necessary to examine at length the parties' correspondence notwithstanding that there was "little doubt as to the actual *subjective* thinking on both sides", that is, notwithstanding that the parties were actually agreed on the essential terms. He did so because "the question of consensus is to be determined not subjectively but *objectively*".

A more clear-cut statement of McGechan J's view appears in his judgment in *Brierley Investments Ltd v Shortland Securities Ltd* (High Court, Wellington, CP 868/91, 18 April 1994). One of the issues which his Honour was called upon to resolve in this complex case was whether an informal agreement in correspondence to lease a commercial building was a binding contract. Since the parties clearly understood that the agreement would be formalised in the usual way in a written contract, an affirmative answer to this question required a finding that the parties intended to be immediately bound and regarded the later document as merely giving more formal expression to their mutual commitments.

The case was somewhat unusual in that the Judge felt able to find on the evidence before him that the relevant officers of the alleged lessee, Brierley Investments, did actually intend to be bound by the informal agreement. Their "actual belief at the time was that a binding deal had been concluded on the correspondence. Anything which remained was drafting detail." However, in the Judge's view this was irrelevant. The question of intention to be bound was "not to be approached subjectively". It was "to be approached on an objective basis". The test was whether a reasonable person in the position of the lessor would have inferred that the lessee intended to be bound (a test which, happily, was found to be satisfied after a careful examination of the terms of the correspondence and the surrounding circumstances).

It is suggested that the Judge appears to misunderstand the purpose and effects of the objective approach to issues of contract formation. That approach does not mean that the subjective intentions of the parties to an alleged contract are to be disregarded. On the contrary, the initial task of a Court must surely be to ascertain whether a common intention *did* exist. And if by chance the evidence establishes that the parties were actually agreed on the same terms and that they did actually intend to be bound there is plainly a contract. There is consensus ad idem in the classical sense. In such a situation the question whether the promisee could reasonably infer intention to be bound on the part of the promisor simply does not arise. The Court is spared the often difficult value judgment which this question involves. As pointed out by Vorster, (1987) 103 LQR 274,286:

> If the parties' subjective understandings of their transaction are the same, there is a valid contract in accordance with that understanding. How reasonable persons would have understood the transaction is irrelevant in this case. □

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Foo J L	Christchurch	16 December 1994
Grundy R F	Christchurch	16 December 1994
Hui H Y P	Christchurch	16 December 1994
Jamieson S A	Christchurch	16 December 1994
Jobson R A	Napier	12 December 1994
Lynn K	Christchurch	16 December 1994
McCallum N C	Christchurch	16 December 1994
MacDonald A M	Christchurch	16 December 1994
MacKinnon D G	Christchurch	16 December 1994
Maling G S T	Christchurch	16 December 1994
Meates A C	Christchurch	16 December 1994
Nuthall A D	Christchurch	16 December 1994
Robinson N J	Christchurch	16 December 1994
Sanford S M	Christchurch	16 December 1994
Smith J B J	Christchurch	16 December 1994
Sutton A A	Christchurch	16 December 1994
Sweeney C A	Auckland	19 December 1994
Thompson E J	Christchurch	16 December 1994
Thomson R C A	Christchurch	16 December 1994
Watts P D	Christchurch	16 December 1994

CER at the cross-roads: Business law harmonisation – where to now?

By Clive Elliott, Barrister, of Auckland

Closer economic relations between New Zealand and Australia have now been developing over a period of ten years with varying degrees of success. It is a regional application of a general movement for the freeing up of trade, a movement that has spawned a host of acronyms, EEC (now EC), NAFTA, APEC and of course GATT. As Mr Elliott points out in this article business law harmonisation between the legal systems of Australia and New Zealand is one of the aims of CER. In this article he looks at the developments towards harmonisation to date both statutory and in terms of judicial decisions. He discusses the possibility of a trans-Tasman Court, at least for commercial areas. There is to be a general review of CER in 1995. While he considers the entire process of closer relations is irreversible the author suggests that progress will be slow.

Introduction

The recent trans-Tasman aviation row has put CER back into the limelight. In New Zealand at least. Back across the Tasman in Australia, CER remains at best a mystery, at worst something of a nuisance!

The CER Trade Agreement is now over ten years old. A major review is due to be undertaken in 1995. This review is likely to shape not just the future direction of CER but also our overall relationship with Australia.

Business law harmonisation is one of the key elements in CER philosophy. That is, on the basis that free competition and trade can only occur successfully in an environment where unnecessary legal and regulatory barriers are removed or at least lowered.

Business law harmonisation has had a somewhat chequered track record. Some of the successes have been more coincidental than deliberate. Others, particularly in the intellectual property area, have been facilitated by international developments that both New Zealand and Australia have been required to comply with.

Nevertheless, it is hard to deny that we are on a course of business law "convergence", for better or worse. I recently gave a paper in Sydney on the topic of the "interface" of our business laws and examined the major developments and trends.

In giving the paper, I stressed that my area of expertise is in relation to intellectual property but that wider business laws harmonisation issues needed to be examined to understand where we are and where we might be going. I repeat this disclaimer here.

Australia and New Zealand's pasts are inextricably linked. This is likely to continue in the future; which is hardly surprising. As Professor John Farrar has noted, the two countries share a number of common characteristics. These include the following:

Both are geographically isolated;
Both resulted from earlier European settlement;
Both are former British colonies but have distinct cultural similarities;
Both share the Common Law heritage;
Both are struggling to find a sense of national identity;
Both have an increasingly assertive indigenous population; and
Both lost a major market when the UK joined the EEC.

Given these similarities it is hardly surprising that the two countries are growing closer together and identify a common future looking, for the first time, East rather than West!

In the area of harmonisation of business law generally and more specifically in relation to intellectual property law, the impact of these factors is important. We need to identify the environment in which this process is occurring. It is important to recognise that the process is a complex and dynamic one.

Closer Economic Relations (CER) – history

CER (Closer Economic Relations) trade agreement was entered into between the governments of Australia and New Zealand on 13 April 1982. It is principally concerned with the establishment of a free trade area.

After World War II there were increasing trading relations between Australia and New Zealand which led to the consideration of the closer integration of the two economies. This led to the implementation of the precursor to CER which was the New Zealand/Australian Free Trade Agreement (NAFTA). It covered forest products and other manufactured items. However, it was far from comprehensive, as the goods listed in Schedule A of the Agreement only covered 53 per cent of goods traded between Australia and New Zealand. Key goods such as dairy products were not covered by NAFTA.

NAFTA's objectives were to promote the expansion of trade and conditions of fair competition between the two countries. These

objectives were to be achieved within the ambit of helping the expansion of world trade and the progressive removal of international trade barriers. NAFTA purported to be a free trade agreement but in reality was only a partial free trade agreement.

In an attempt to provide for a genuine free trade agreement the CER Agreement was entered into. It aims for closer economic relations between Australia and New Zealand through the expansion of free trade under conditions of fair competition along with the elimination of trade barriers. The agreement also has the more general aim of strengthening the broader relationship between Australia and New Zealand. Communication is ensured under the agreement, as it allows for consultations to take place between the two countries in order to review the operation of the agreement.

Current status of CER

There are still a number of areas in which harmonisation of laws between Australia and New Zealand has not taken place.

Firstly, the new Companies legislation in New Zealand is very different in approach to the complex black letter law of the Australian Companies Act. A key provision of the New Zealand Companies legislation is the solvency test, which has no real counterpart in the Australian Act. Also the insider trading laws of both countries are very different.

Secondly, there has also been a lack of harmonisation in the tax and accounting area which has caused a certain amount of comment in the media. New Zealand business has complained to the Minister of Finance that its foreign tax regime, particularly the non-resident withholding tax and controlled foreign company provisions, are so different from the Australian provisions (and most other industrialised nations) that Australian companies are given an unfair advantage to the detriment of New Zealand businesses. There are also other trans-Tasman differences, such as New Zealand's GST and Australia's capital gains tax.

Thirdly, in terms of the competition law area, whilst the Commerce Act was based on the Australian Trade Practices Act there are still some differences in the way the Courts have applied this Act. On top of this Australia also appears to be moving back towards compulsory pre-merger notification.

Apart from the failure in harmonisation of some business laws, there are also other facets of CER which are causing controversy.

Firstly, in the "intermediate goods" area Australia is pushing for duties on certain New Zealand products apparently to compensate for lower raw material costs. For example, Australia argues that New Zealand clothes and garments may have a cost advantage in the trans-Tasman market because New Zealand does not impose duty on cloth imports because it has no domestic cloth making industry. The Australian cloth making industry on the other hand is protected partly by duties on imported cloth.

Secondly, there are the indirect subsidies and benefits being provided by the Australian government to its industries which are causing dissatisfaction in New Zealand. An example is Queensland's sugar industry, which on the surface is unsubsidised. However, commentators argue that when you look behind the scenes there are massive subsidies for things like irrigation schemes which can be converted down into a dollar value per tonne of sugar produced.

Thirdly, there is the issue of the "country of origin" rule. In order for goods to get the benefit of the free trade agreement between the two countries, a product has to have a minimum of 50 per cent local content. Further, the last step in the manufacturing process must have been done locally. As New Zealand manufacturers have improved in efficiency they have made more use of imported raw materials, which has made it harder for them to meet the 50 per cent requirement.

Fourthly, the civil aviation market memorandum of understanding which was signed in 1992 is as good as dead. Whether the current row is a temporary aberration or the sign of something more serious and long-lasting remains to be seen.

Nevertheless, despite the problems facing CER, there can be no doubt that there have been a number of positive features to come out of the Agreement. New Zealand exports to Australia soared fom $1.96 billion in 1988 to $3.18 billion in 1992 with Australia taking 18.4 per cent of New Zealand's total exports by May of 1993.

There has been one positive development for CER recently involving the textile, clothing and footwear (TCF) industries. These were classed as part of the "sensitive industries" which it was agreed should be left out of the CER free trade list. Accordingly, they were given extra time to allow them to adjust to the competition. In July of 1990 having adjusted to the competition, they joined the other goods which were allowed duty free access to each country's markets. At the same time New Zealand manufacturers restructured their operations and increased production. They did this so efficiently that their increased clothing exports across the Tasman alarmed the Australians.

Over the last two to three years Australian manufacturers have responded by lodging a number of complaints with Canberra's Customs Department forcing them to extensively investigate New Zealand imports. These disputes lead to a lot of expensive litigation which was unable to be resolved by meetings between officials of the two countries.

Ironically, it was representatives of the TCF industries who in September managed to settle their differences over trans-Tasman trade. At the same time they developed a plan to collaborate in a joint attack on world markets. Their aim is the lifting of their combined clothing exports to the rest of the world from the current $500 million to $3.5 billion over the next ten years.

This development has been seen as a very positive one by commentators and some feel it could prove to be just the tonic that CER needs if it is not to be seen to have run its course.

Harmonisation of business laws

As part of the CER negotiations between the two countries, three protocols were signed on 18 August 1988 which agreed to a movement towards the creation of a single trans-Tasman market from 1 July 1990 for both goods and services.

A further product of these negotiations was that on 1 July 1988 a Memorandum of Understanding on the harmonisation of business law was signed. This recognised that

differences in business laws and regulatory practices between the two countries may impede the CER relationship by inhibiting the creation of an environment conducive to the growth of trade in goods and services and the efficiency of both economies.

Therefore the future harmonisation of significant areas of business law and regulation was seen to be of mutual benefit to both countries. It was agreed that a number of areas of business law would be examined with a view to harmonisation. One of these areas was copyright law, (including support of appropriate international conventions), and the protection of computer software and integrated circuits.

Under the Memorandum both parties set a 30 June 1990 deadline for agreeing on issues for further reform. The Memorandum did state that harmonisation does not require the unification or replication of laws.

In 1991 the New Zealand Minister of Commerce, Philip Burdon, explained what was meant by harmonisation. He said that the Government's approach to the harmonisation of business laws between Australia and New Zealand did not extend to full assimilation. He stated that the purpose of CER was the enhancement of New Zealand and Australia's economic welfare, but at the same time both countries should be able to pursue distinct policy objectives if they desire to.

Therefore the New Zealand government is very careful to only adopt those business laws which it feels to be appropriate for New Zealand's future direction. The Minister said that harmonisation of business law is concerned more with the assessment of what traditionally has been considered "domestic" regulation, such as company law and competition law.

He said that if these laws are incompatible businesses trading in both countries may face higher transaction and compliance costs. Therefore harmonisation was aimed at the reduction of these transaction and compliance costs rather than a policy shift in the direction of assimilation.

Steps towards harmonisation

Since 1988 the following steps have been taken in the harmonisation process:

Enactment of the Foreign Judgments Act 1991 in Australia and the reciprocal enforcement of Judgments Amendment Act 1992 in New Zealand. (This is discussed later).

Enactment of the Australian Mutual Assistance and Business Regulations Act, which broadly parallels similar provisions in the New Zealand Securities Act.

The enactment of the New Zealand Consumer Guarantees Act 1993 which brings New Zealand law on consumer sales into alignment with Part V of the Australian Trade Practices Act.

The enactment of the Financial Reporting Act 1993 in New Zealand which parallels fundamental Australian reforms in the area of company accounting standards.

Australia's ratification of the Convention of the Settlement of Investment Disputes between States and Nationals of other States, to which New Zealand was already a party.

New Zealand's passage of legislation to allow it to accede to the Patent Co-operation Treaty, to which Australia is already a party.

Section 36A of the Commerce Act 1986 was amended by the Commerce Amendment Act so as to prohibit any person who has a dominant position in a market in New Zealand from using that position to restrict competition.

The New Zealand Commerce Act itself is perhaps one of the best examples of "harmonisation". It was substantially based on the Australian Trade Practices Act. The New Zealand Fair Trading Act was also largely derived from that Act as well. However, the New Zealand legislation was based on the equivalent Australian legislation not in order to achieve conformity (this being before the "harmonisation" era) but because the Australian Act was well regarded in New Zealand.

In 1992 there was a ten-yearly review of CER by the two governments. It was aimed at removing the remaining impediments to the operation of a trans-Tasman market. The two governments agreed to the full integration of aviation markets, to harmonise customs and quarantine regulations, to achieve more efficient trans-Tasman shipping, and to recognise mutual standards and occupational qualifications.

Australia agreed to bringing construction, engineering and banking services under the Agreement, while New Zealand agreed that it would remove stevedoring and specified aspects of broadcasting and airways services from its exempt list. The governments also agreed meetings should be held once a year at least to review the operation of CER, with another general review scheduled for 1995.

Judicial support for CER and harmonisation

There have also been a number of expressions of support for harmonisation by the New Zealand Courts over the years since 1983.

The first acknowledgement of the CER Agreements by a New Zealand Court came in *Crusader Oil v Crusader Minerals* (1984) 1 TCLR 211 in which Jeffries J stated that a Court is justified in taking into account a trade agreement which will in future bind two countries closer in their trading relationship and which, in turn, affects the issue of a company's reputation and goodwill in either of the trading States.

In *Dominion Rent-A-Car v Budget Rent-A-Car* [1987] 2 NZLR 395, Cooke P stated (at p 407), that whilst similar legally enforceable rules are not in force between New Zealand and Australia, the Courts of the two countries should be prepared as far as reasonably possible to recognise the progress that has been made towards a common market under the NAFTA and CER Agreements.

Cooke P has also observed in *Wineworths v CIVC* [1992] 2 NZLR 327 at p 331, that the Court of Appeal has been and is sympathetic to progress in integrating the general market in Australia and New Zealand as far as reasonably practicable, and has been willing therefore to develop the law to protect the legitimate interests of Australian traders. However, in the present case the Court was unwilling to grant protection to the defendant's interests as they were illegitimate interests.

One case in which the interests of an Australian trader were protected was *Vicom New Zealand Limited v Vicomm Systems Limited* [1987] 2 NZLR 600. In that case the plaintiff company was a subsidiary of an Australian company. In entering judgment for the plaintiff the Court of Appeal stated that in the interests of trans-Tasman co-operation, New Zealand law should, as far as is reasonably possible, be administered so as to protect the legitimate interests of an Australian company associated with a New Zealand company in that way.

The Court of Appeal has also stated in *Taylor Bros Limited & Taylor Group Limited* [1988] 2 NZLR 1 at 39 that certain points which are well settled in Australia under the Trade Practices Act may be said with confidence to be equally applicable in New Zealand in the interpretation of the Fair Trading Act. This is due to the fact that the whole of the New Zealand Act is largely derived from Part V of the Australian Act.

In *Commerce Commission v L D Nathan & Company Limited* [1990] 2 NZLR 160 in which a criminal prosecution was made for the sale of children's night clothes which breached the Fair Trading Act 1986 because they did not comply with safety standards and were incorrectly labelled, it was stated that in considering sentencing policy under the Act benefit can be obtained from decisions under similar provisions of the Australian Trade Practices Act 1974. The High Court noted that it is desirable, so far as is reasonably practicable, that there be consistency in the application of the two Acts.

It is clear from these cases that the New Zealand Courts have unequivocally embraced the underlying philosophy of CER. My researches have not been able to locate a similar approach by the Australian Courts.

Trans-Tasman jurisdiction

In the past few years a series of proposals have been made to create a trans-Tasman jurisdiction.

There are two main statutes which are applicable. Section 36a of the Commerce Act 1986 prohibits any person who has a dominant position in a market in New Zealand or Australia from using that position for the purpose of:

Restricting the entry of another person into that or any other market;

Preventing or deterring a person from engaging in competitive conduct in a market;

Eliminating a person from that or any other market.

The provisions of s 36a are mirrored in Australia by s 46a of the Trade Practices Act.

However, the tests imposed under the trans-Tasman provisions of s 36(a) of the Commerce Act and s 46(a) of the Trade Practices Act are different. The level of market power where intervention is possible under s 46(a) of the Trade Practices Act seems, to be lower than that required under s 36(a) of the Commerce Act.

The Australian test is "substantial degree of market power", whilst the New Zealand test is "dominant position in a market". Accordingly, some commentators argue that New Zealand companies may be confronted more often for alleged abuses of market position in Australia than their Australian counterparts in New Zealand.

However, in its 1992 Report on CER the Steering Committee stated that it did not consider that this divergence of approach has impeded trans-Tasman trade or has affected the competitiveness or efficiency of the respective economies.

The Commerce Act was also amended in 1991 to enable the Federal Court of Australia to take evidence in New Zealand when dealing with a trans-Tasman issue. The same provisions were also provided for in Australia with the Trade Practices Act. Similarly, the Evidence Amendment Act 1994 also allows for the taking of evidence in New Zealand by an Australian Court and the serving of trans-Tasman subpoenas.

Secondly, there is the Reciprocal Enforcement of Judgments Amendment Act 1992. This legislation arose from the memorandum of understanding on harmonisation of business laws which had called for legislation facilitating the reciprocal enforcement of a wide range of judgments and orders between Australia and New Zealand.

The Act makes a number of important amendments to the Reciprocal Enforcement of Judgments Act 1934, and in particular opens the way for enforcement in New Zealand of foreign injunctions and other non-money judgments.

It also allows for the enforcement of the decisions of specified inferior Courts and the enforcement of Australian tax judgments in New Zealand.

Is a trans-Tasman Court feasible?

The issue of a trans-Tasman jurisdiction has given rise to arguments being put forward for the establishment of a trans-Tasman Court. The chief Australian proponent of this has been Justice Michael Kirby, the President of the New South Wales Court of Appeal. In 1983 he delivered a paper at Auckland University in which he explored the various possibilities of an acceptable trans-Tasman Court.

His first proposition was that a federation between Australia and New Zealand could make economic and political sense. He stated that the Australian Constitution allows the admission of new States. Therefore federation with New Zealand would be possible if New Zealand was admitted as a State of Australia.

Short of federation between New Zealand and Australia, Justice Kirby put forward a number of other more limited possibilities to address the problem of the need for an inter-jurisdictional Court to resolve the likely increase in trans-Tasman legal duties. The first of these was the concept of a regional Privy Council.

He felt that the Australian members of the judicial board of the Privy Council could be used to make up this regional Privy Council, along with other appropriately qualified Judges from New Zealand and the Pacific. He felt that this proposal still provides what (at least in machinery terms) would be the simplest method of creating a trans-Tasman or South Pacific Court of Appeal of High Authority.

The second possibility put forward by Justice Kirby was to confer jurisdiction to hear trans-national appeals upon the High Court of Australia. He said that appeals to the Court could theoretically be allowed from New Zealand Courts, possibly limited to defined matters, such as the interpretation of "harmonised" statutes on tax, trade practices,

corporations, exchange control and the like.

Justice Kirby's third proposal was that instead of allowing appeals to the Privy Council a South Pacific Court of Appeal could be established. This would be comprised of Judges from the South Pacific region.

Justice Kirby's next suggestion was for a trans-Tasman commercial Court with a limited jurisdiction, to hear particular cases of mutual concern to Australia and New Zealand. He felt that specialist Judges could be appointed to this Court, particularly those with familiarity in commercial law, tax and the like. Such a Court could develop its own jurisprudence and could contribute to uniform interpretation of harmonised laws. It also might have powers conferred on it directly to enforce decisions in both countries. Justice Kirby cited the European Court of Justice as the nearest equivalent to such a concept.

The main problem with this proposal is that there could not be any appeal from the High Court of Australia to such an inter-jurisdictional trans-Tasman Court without amendment to the Australian Constitution. Justice Kirby thought such an amendment would be unlikely. On top of this, he felt that even if such a Court was set up, it would have precisely the same definitional problems as have arisen in Australia in recent years in relation to the jurisdiction inter-se of the Federal and State Courts.

Due to the problems which exist with all of the above approaches, Justice Kirby concluded that the best solution for CER was the federation of New Zealand and Australia.

Trans-Tasman Competition Court

Another commentator to look at the possibility of a trans-Tasman Court was Warren Pengilley. In 1990 he suggested that a trans-Tasman Competition Court should be established so that there is a uniform approach to competition law between the countries. However, he saw problems with such a concept going ahead, created in part by the Australian constitution.

In its 1992 review of CER, the Steering Committee recommended against the establishment of a new single trans-Tasman competition authority, or the joint consideration of mergers (with trans-Tasman implications) by the New Zealand Commerce Commission or Australian Trade Practices Commission. This was because the Committee thought it was not clear that the advantages of joint investigations outweigh the disadvantages; constitutional difficulties in Australia; the difficulty of establishing an appropriate appeal mechanism; and the additional costs to Governments and business.

Auckland barrister, Jim Farmer QC, has also expressed support for a trans-Tasman Court with limited jurisdiction to hear commercial issues. However, he too acknowledges that this would require rewriting the Australian Constitution which would be a massively difficult task. However, he believes at some point a trans-Tasman Competition Court will become essential, perhaps with specialist Judges whose uniform decision making could help the CER harmonisation process.

Farmer has also expressed support for the idea of an Australasian Court of Appeal to replace the New Zealand appeal right to the Privy Council. This Court would combine the most senior Judges from the New Zealand Court of Appeal with those from the High Court of Australia, sitting as one Court.

While the idea of a trans-Tasman Court sounds good, a fair bit of work will be required to make it a reality.

Mutual recognition

One area where real progress is being made is in relation to "Mutual Recognition". "Mutual recognition" refers generally to the Australian mutual recognition scheme which came into effect on 1 March 1993. Under this scheme goods that meet the standards for sale in their home state can be sold in any other State in Australia. Similarly, people working in regulated occupations have their qualifications and registration recognised in all States. In a sense mutual recognition is similar to harmonisation, albeit in a less developed form.

The Australian and New Zealand Governments have been negotiating over whether appropriate recognition should be extended to operate between the two countries as part of CER.

In New Zealand the mutual recognition idea was introduced in 1992 by the then Associate Trade Minister, Philip Burdon, on the basis that mutual recognition would provide an impetus for harmonisation.

There are problems. In October 1992, Australia took food inspection out of the regime, making it tougher for New Zealand exporters. However, since May of 1994 talks have been taking place between Australian and New Zealand officials with a view towards food standards harmonisation. New Zealand is also aiming to be excluded from Australia's imported food inspection programme.

There has been some controversy in food standards harmonisation negotiations because the New Zealand government is opposed to food additives such as vitamins and minerals being put into food by manufacturers.

Mutual recognition of standards and qualifications has yet to be agreed upon by the two countries.

The "QC" question!

In September 1994, three Australian QCs, John Lyons, Frank Callaway and David Shavin, were appointed as Queen's Counsel in New Zealand. The New Zealand Attorney-General, Paul East, made the appointments under a recent reciprocity agreement signed between the two countries, which is part of the general harmonisation process under CER.

The appointments have caused a certain amount of controversy in New Zealand. Jim Farmer, QC, is reported to have stated that the appointments went to the very issue of national sovereignty and that in terms of appointments to higher office, such as that of Queen's Counsel, New Zealand should make its own appointments and not adopt those of another country. He said that New Zealand would never let Australians choose its Judges or Prime Minister, but in this case it had effectively allowed Australia to appoint three of its QCs.

Mr Farmer argued that the correct procedure would have been for the three Australian barristers to have been admitted to the bar and allowed to appear in New Zealand frequently enough to become known to the profession so that members of the

profession could satisfy themselves that the barristers were suitable to become QCs in New Zealand.

Raynor Asher QC, then President of the New Zealand Bar Association, is also reported to have expressed grave concern about the appointments. He too felt that those conferring QC status on these barristers would have found it difficult to have the necessary depth of knowledge of their competence and mentioned the fact that there are many people of high ability and experience in New Zealand who have not as yet got silk. He also stated that these QCs may have an unfair advantage over New Zealand practitioners in gaining work from Australian companies operating in New Zealand.

Solicitors, Accountants and Patent Attorneys

Regulations in both Australia and New Zealand allow solicitors to practise on both sides of the Tasman.

New Zealand solicitors who have not less than five years post-admission experience in New Zealand, will automatically qualify for admission in any Australian jurisdiction, subject only to the satisfaction of charter requirements. New Zealand solicitors with less than five years experience will have to apply to the relevant authority which will set out what requirements must be fulfilled to put them in a substantially similar position to a person trained and qualified in Australia.

The New Zealand Law Society has matched these Australian provisions by agreeing that Australian lawyers with five years or more experience in Australia are now able to seek admission in New Zealand without having to complete any extra study.

The new policy is a significant development on the previous position, which allowed unconditional admission only for those with substantial seniority in the Australian profession.

It is understood that the accountancy profession is moving down a similar path towards mutual recognition. However, the patent attorney profession seems to be swimming against the tide, with mutual recognition not supported on either side of the Tasman.

A joint New Zealand/Australia "Green Paper" setting out the proposed framework and terms of a mutual recognition agreement was due to be released in November 1994. The plan is an agreement which will be ready for signing by Heads of Government in August 1995. Implementation is planned for 1996/1997.

Harmonisation of Intellectual Property Rights

In 1992, the Steering Committee in its report on harmonisation under CER stated that in terms of copyright, the differences between Australian and New Zealand laws have not caused any concern in Australia nor in New Zealand. The only areas of difference identified by the Committee as having possible implications for trans-Tasman trade were parallel importation, the interaction between copyright and designs and the royalty on blank recording tapes.

Mark Steele, from the New Zealand Ministry of Commerce, stated in a speech to the Annual General Meeting of the Researched Medicine Industry Association on 15 March 1994 that the New Zealand approach in respect of intellectual property rights has been a combination of two approaches:

(1) To achieve compatibility of laws wherever possible and practical; and
(2) To view harmonisation in the context of being a joint effort by both countries to utilise the best features of their respective business laws.

Harmonisation of business law between New Zealand and Australia has not been seen as requiring a wholesale creation of common laws and practices between the two countries. Rather, harmonisation is considered in the context of whether there are good, logical reasons for aligning the intellectual property laws between the two countries.

Given the above background it is hardly surprising that, in the area of intellectual property law, harmonisation has not been a major issue. Whatever the intentions might have been, as a matter of reality neither country seems too concerned about harmonisation in the substantive law area.

Layout designs

As a practical example of harmonisation at work, two recent pieces of legislation are considered. The first is the New Zealand Layout Designs Act which was introduced earlier this year and comes into force in January 1995. It is based substantially on the Australian Circuit Layouts Act 1989.

When the Circuit Layouts Act was introduced in Australia this was done without consultation with New Zealand. Indeed, New Zealand was not even included in the list of eligible countries covered under the legislation, notwithstanding the fact that its law entitled it to be. This caused a fair bit of controversy at the time and the explanation was that it was simply an "oversight". It has since been corrected.

Notwithstanding this hiccup, New Zealand adopted, largely unchanged, the Australian Circuit Layouts Act. Arguably, this is an illustration of harmonisation working well.

Copyright

A more recent example illustrates that at a substantive level at least we are moving apart, not together. In the important copyright area, rather than following the Australian lead, New Zealand has passed an Act in December 1994, based largely on the 1988 United Kingdom Act.

It appears the reason the United Kingdom, rather than Australian, model was followed, was that the Australian Copyright Act was regarded by New Zealand commentators as disjointed and convoluted both in terms of content and drafting style. It was also felt that the Australian Copyright Act did not deal adequately with the new technologies, notwithstanding the fact that these are currently under review. In contrast, it was felt that the United Kingdom Act was a model of simplicity and clarity and was highly regarded around the world.

These examples show that in certain areas we are converging but in others we are diverging. As such, harmonisation seems to mean different things to different people.

New Zealand and Australia have apparently reviewed the industrial property rights regimes in the two countries in the context of the memorandum of understanding. The

conclusion seems to have been that the differences in the legislation, including the approach to the way in which the respective Patent Offices process applications between the two countries, were not creating impediments to trade between Australia and New Zealand.

The prevailing view seems to be that this will continue to be the case, even with any new differences which may have arisen as a result of the recent legislative changes in New Zealand.

However, issues such as exhaustion of rights, which are important both in respect of intellectual property and also wider economic policy, may need to be addressed. Given our closely linked markets it certainly makes sense that we should have similar regimes governing parallel importing.

Other legislative changes

Both Australia and New Zealand are going through a hectic period of change in the intellectual property law area.

In New Zealand the GATT (Uruguay Round) Act 1994 implements s 5 of Part II (Articles 27 to 34) of the TRIPS Agreement. It amends a series of New Zealand Statutes. Some of the major changes are as follows:

Patents Act 1953

The term of patents extended to 20 years.

Trade Marks Act 1953

There is a new expanded definition of a trade mark.

The trade mark infringement text is changed. Infringement will occur where there is use of a confusingly similar sign on goods or services which are the same or similar to those for which the trade mark is registered.

Geographical Indications

A register of protected geographical indications is established.

Confidentiality

The Animal Remedies Act 1967, The Pesticides Act 1979 and The Medicines Act 1981 are to be amended. It requires the various Government Boards to keep information supplied to them (pursuant to applications to market medicines, pesticides and animal remedies) in confidence.

It is understood that largely equivalent amendments are being made in Australia through a series of Bills currently before the House or through recent legislation which has been enacted. In terms of the TRIPS Agreement, this has brought a form of international harmonisation (even though it is not a harmonisation treaty as such) through the minimum standards and enforcement requirements which are in the Agreement.

In a practical sense the TRIPS Agreement has probably done more to harmonise our respective intellectual property laws than any other efforts; on both sides of the Tasman. However, this was a one-off phenomenon and from here on in effective harmonisation will depend more on the efforts of our respective Governments than international developments.

Intellectual Property Law Reform – The 1995 agenda

In the Patents Act area, Australia has recently amended its law. In New Zealand, a new Patents Bill is expected to be introduced in 1995. The Bill will be based in part on the recommendations of a 1992 discussion paper and combine provisions from the Australian Patents Act and the 1988 United Kingdom Act.

In the trade marks area a Bill is expected to be introduced in New Zealand in 1995. In Australia a trade mark Bill was introduced this year.

In the designs area, the current New Zealand proposal is for an unregistered design right similar to that found in the United Kingdom, followed by the ability to obtain registered design protection. In doing so, New Zealand has followed the European/United Kingdom model. It is understood that the Australian Law Reform Commission is currently reviewing registered design law and has held wide-ranging discussions. It appears likely that Australia will also follow the European model. This will bring New Zealand and Australia into sync.

These recent developments show that harmonisation is being driven in part by international developments and in part by pragmatism – in trying to choose the best legislation in each case. It is clear that neither Australia nor New Zealand is adopting harmonisation for harmonisation's sake.

The Future

What does the future hold for CER, harmonisation and mutual recognition? David Barber, in the *National Business Review* of 11 November 1994, posed the question of whether our so-called "special relationship" with Australia was in jeopardy. That is notwithstanding the fact that we remain a very important trading partner, taking 20 per cent of all Australian export manufactures.

The aviation "open skies" row may signal a new toughness on the part of the Keating Government. It may even be a pretty strong signal that all is not well and that CER has largely run its course.

I suspect that all will be revealed after the 1995 CER review.

As we peer ahead, here are a few predictions:

- Progress on the CER front will slow in the year ahead;
- After conclusion of the TRIPS-induced harmonisation of intellectual property laws the process will lose momentum until further international developments, such as the Madrid Protocol, force further change;
- Mutual recognition will be pursued by both Governments but it will become more of a "hot potato" and this may well hinder progress in the short-term;
- Eventually, the political and economic realities of our common situation will draw us together as we struggle to find our place in the world; and
- Whether we like it or not the entire process is likely to be irreversible. □

The Privy Council decision in *Telecom v Clear*: Narrowing the application of s 36 of the Commerce Act 1986

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The Privy Council decision in the case of Telecom Corporation v Clear *has been treated in the media as another example of a "foreign" Court overturning the decision of a "local" Court, the New Zealand Court of Appeal. What gets overlooked too often in this sort of argument is that here, as has happened in some other cases, the Privy Council in fact confirmed the judgment of a New Zealand Court, the decision of the Judge of the High Court as first instance – even though on somewhat different reasoning because it was dealing with the reasons given by the Court of Appeal. This article considers the various judgments, and looks critically at the various interpretations of the word "use". It argues that the Privy Council test, for anti-competitive purposes, is unhelpful.*

In October 1994 the Privy Council overturned the decision of the Court of Appeal in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* (Privy Council Appeal No 21 of 1994), and in so doing has placed severe limitations on the future application of s 36 of the Commerce Act 1986. At issue in the case was the price of connection of Clear to the Public Service Telecommunications Network ("PSTN") owned by Telecom. This interconnection was needed for Clear to be able to compete with Telecom in the market for local telephone services, (primarily for business customers in the Central Business districts of the larger cities). It was necessary that Clear customers could call Telecom customers and vice versa.

It was recognised at the outset that firms have no general duty to help their competitors. However, there are some situations where a monopolist does have such a duty and where refusal would be a contravention of s 36 of the Commerce Act. This is where the monopoly supplier discriminates against a customer because that customer has decided to compete with it. If, as in this case, access is being sought by a competitor to a facility owned by the monopolist, and this access is necessary for the competitor to be able to compete with the monopolist, then in order to avoid contravention of s 36, access should be provided at a price which does not deter competition. In this case there was no question that Telecom had to provide access – the only issue was the price or terms of access.

The price and conditions of interconnection demanded by Telecom at the time of the High Court hearing were considered by that Court to contravene s 36 of the Commerce Act. However, Telecom then put forward a pricing rule, based on the theories of two eminent US economists, Professors Baumol and Willig. The High Court held that Telecom's use of this rule (later called the "Baumol/Willig rule") would not be a contravention of s 36 ((1992) 5 TCLR 166, 196 (HC)). The essential elements of the rule, as described by the Privy Council are as follows (p 8):

> . . . the Rule propounds the proposition that, in a fully contestable market, someone selling to a competitor the facilities necessary to provide a service that the seller could otherwise provide himself would demand a price equal to the revenues he would have received if he had in fact provided the service himself, "the opportunity cost".[1]

Application of this rule would allow Telecom to demand a price which covered the average incremental cost to it of supplying the PSTN, plus the revenue it would have received had it supplied the service to the Clear customers, less the costs it saved because Clear was providing and handling any calls to or from Clear customers.[2]

The High Court did not make a definite pronouncement as to whether it considered the use of the rule to be a "use" of a dominant position, but preferred to base its determination on its belief that Telecom did not have one of the anti-competitive purposes in s 36(1)(a) - (c). For a contravention of s 36 to be shown it is necessary to prove that the firm has a dominant position in a market; that the firm has used that dominant position; and that the use has been for one or more of the anti-competitive purposes in s 36(1)(a) - (c), (ie restricting entry, or preventing or deterring competitive conduct, or eliminating a person from that or any other market). The High Court considered that "[i]f the defendant's conduct is more likely

than not, in light of available alternatives, to improve competition, the defendants cannot be said to be in breach of the purpose requirements of s 36" (p 217). There was no breach of the purpose requirements because the Court believed that the implementation of the rule was "more likely than the alternatives to improve competition in New Zealand communications." (p 217). Although effect did not necessarily imply purpose, Telecom's intent could be inferred from an analysis of the true character of the charging regime it proposed.

The Court of Appeal considered that both the use and the purpose elements of s 36 had been shown. Cooke P stated (p 103,343):

> . . . the rule would seem obviously anti-competitive and in breach of s 36 of the Commerce Act. It would amount to allowing a new entry into a market on condition only that the competitor indemnify the monopolist against any loss of custom. That would at once be an unreasonable use of monopoly power, a restriction on entry, and a prevention on deterrence of competitive conduct . . . [I]t seems to me that a substantial purpose of the monopolist in laying down such a condition is to restrict competition so as to preserve its own position as far as possible.

Cooke P was not persuaded that Telecom would necessarily wish to compete with Clear by lowering its prices (and thus competing away these monopoly profits). He considered that Telecom might prefer to rely on the indemnity than to lower prices: "After all the rule is intended to make it a matter of indifference to Telecom that the traffic is shared with a competitor" (p 103,343). Gault J also considered that use of the Baumol/Willig rule would be a use of a dominant position as recovery of such "opportunity costs" (including monopoly profits) was "something only a monopolist could assert", and not something that could be done in a perfectly contestable market (p 103, 356). He stated (p 103,360):

> Taken together as a package Telecom's terms for interconnection were more onerous than could have been insisted upon in a fully competitive market. They were not justified. Insistence upon them was use of Telecom's dominant position and necessarily they prevented Clear from entering the market.

He also considered that Telecom had an anti-competitive purpose in proposing to use the rule:

> In circumstances such as prevail in this case – where a competitor realistically cannot enter the market without access to the facilities of a firm in a dominant position, a separate investigation of the purpose of the behaviour is hardly necessary. The anti-competitive purpose is to be inferred from the inevitability of the consequences of refusing to deal except on terms that lead to competitive disadvantage. (p 103,360).

The Privy Council overturned the decision of the Court of Appeal, but did not express the same view as the High Court. It considered that Telecom did have the purpose of deterring competition in the market (p 21):

> . . . Telecom's submissions before the Board concentrated on seeking to show that Telecom did not have an anti-competitive purpose. This was a hopeless task not only because it would be most improbable that Telecom lacked the purpose to deter its bitter rival, Clear, but also because its past conduct and certain of its internal memoranda show that in fact it did have that purpose.

It decided this even though it believed that the use of the Baumol/Willig rule would not deter competitive conduct (the very reason that the High Court decided that purpose could not be shown). However, the Privy Council decided that Telecom did not contravene s 36 in using the Baumol/Willig rule because it did not *use* its dominant position. This was despite the fact that Counsel for Telecom had conceded that it would be difficult to argue there was no "use" of a dominant position, and had essentially relied on showing there was no anti-competitive purpose. It is difficult to see that the Privy Council took anything but a very simplistic view of the meaning of "use", but in the end that was the factor which determined the case. The Privy Council set out first the way in which s 36 was to be interpreted (p 20):

> In the present case there has never been any dispute that Telecom is in a dominant position in a market which, it is now common ground, is a New Zealand national market. The issues are whether it has "used" that position and if so, whether such use was "for the purpose of" producing results (a), (b) or (c) [of section 36(1)]. The use of a dominant position otherwise than for one of those purposes does not constitute a breach. Contrariwise, the fact that a person has acted in order to achieve one of the purposes (a), (b) or (c) does not constitute a breach unless he has used his dominant position to achieve those purposes.

It went on to disagree with the proposition of Gault J in the Court of Appeal, that in deciding whether "use" has been made of a dominant position, to ask whether the defendant has acted reasonably or with justification.[3] It considered that such a test would place a monopolist firm in "an impossible position" (p 21), as it "could have little idea what, in the future, a Court would find to be reasonable or justifiable" (p 22). It considered that "section 36 must be construed in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful" (p 22). Unfortunately, it then proceeded to give a test for "use" which is confusing in the extreme:

> In their Lordships' view it cannot be said that a person in a dominant market position "uses" that position for the purposes of section 36 unless he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.

It is clear that the Privy Council did not mean the statement above – ie one cannot be using one's dominant position unless one acts as a person who is not in a dominant position would act. There are several alternatives as to what the Privy

Council did mean, but when the remainder of the judgment is taken into consideration, it is clear that the Privy Council had meant to include the word "if" instead of the word "unless", ie:

> In their Lordships' view it cannot be said that a person in a dominant market position "uses" that position for the purposes of section 36 [if] he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.

The case was effectively determined at this point. However, the Privy Council went on to consider whether there was or was likely to be a deterring of competition. It considered the Baumol/Willig rule did not prevent competition in the contested area and that the risk of monopoly rents had no bearing on this question (p 27).

As the Baumol/Willig rule was one which would be used by firms in fully contestable or fully competitive markets the Privy Council considered it could not be a "use" of a dominant position if used by a dominant firm. The fact that monopoly profits could be incorporated when used by a dominant firm, but not when used by a competitive firm, was not considered to be relevant. The monopoly profits could be tackled by either a regulatory body artificially restricting the price chargeable (as under Part IV of the Act) or by introducing efficient competition. It stated (p 29):

> If, as their Lordships consider, on the true construction of the Commerce Act, section 36 does not operate to exclude Telecom from initially charging monopoly rents (if any) and the elimination of such monopoly rents is (otherwise than by competition) within the province of Part IV of the Act, it is irrelevant to the court's function to take into account Government policy. The Government can either adopt the policy of leaving Clear's competition to compete out Telecom's monopoly rents (if any) or activate the Part IV machinery which is available.

The Privy Council considered that the Court of Appeal had incorrectly taken the view that s 36 "had the wider purpose, beyond producing fair competition, of eliminating monopoly profits currently obtained by the person in the dominant market position" (p 27). With respect, this is an unfair criticism of the Court of Appeal, whose arguments concerning monopoly profits were mainly concerned with the showing of "use" or "purpose" – essential elements of s 36.

Two difficulties can therefore be seen to have arisen from the judgment of the Privy Council:

(i) It has provided a test for "use" that is likely to be too narrow to meet adequately the aims of s 36, and
(ii) It has ensured that s 36 cannot be relied on to prevent monopoly rents being demanded by dominant firms in situations where it is necessary for such firms to provide access to facilities they own or control in order for there to be competition in the market. It is hard to see that there is any role left for "light-handed" regulation in such cases.

The remainder of this paper will address only the first of these difficulties, for this involves the interpretation of one of the essential elements of s 36, and therefore has the potential to do the greatest damage to the application of that section.

The meaning of "use" of a dominant position: Development through precedent

The first case to consider fully the meaning of "take advantage of" (in s 46 of the Australian Trade Practices Act) – the equivalent to "use" in s 36 of the New Zealand Commerce Act – was *Queensland Wire Industries Pty Ltd v BHP Co Ltd* (1989) 83 ALR 577; (1989) ATPR 40-925. This was a decision of the High Court of Australia with respect to the refusal by a large steel manufacturer, BHP, to supply Y-bar (a steel product used in the manufacture of star picket posts) to Queensland Wire Industries Pty Ltd. Queensland Wire wished to produce star picket posts in competition with a wholly owned subsidiary of BHP (Australian Wire Industries Pty Ltd). The High Court decided that the words "take advantage of"[4] had no pejorative connotations, and had the meaning merely of "use". The various Judges expressed similar views about when a firm could be said to have taken advantage of, or used, its substantial degree of power. Mason CJ and Wilson J stated (p 585 (ALR); p 50,011 (ATPR)):

> In effectively refusing to supply Y-bar to the appellant, BHP is taking advantage of its substantial market power. It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-bar from the appellant. If BHP lacked that market power – in other words, if it were operating in a competitive market – it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure its supply of Y-bar from a competitor.

Dawson J stated (p 593 (ALR); p 50,016 (ATPR)):

> . . . There can be no real doubt that BHP took advantage of its market power in this case. It used that power in a manner made possible only by the absence of competitive conditions. Inferences in this regard can be drawn from the fact that BHP could not have refused to supply Y-bar to QWI if it had been subject to competition in the supply of that product.

Toohey J stated (p 604 (ALR); p 50,025 (ATPR)):

> The only reason why BHP is able to withhold Y-bar (while at the same time supplying all the other products from its rolling mills) is that it has no other competitor in the steel product market who can supply Y-bar . . . It is exercising the power which it has when it refuses to supply QWI with Y-bar at competitive prices; it is doing so to prevent the entry of QWI into the star picket market . . .

The "test" that has been derived from these statements has been described in various ways (not all of them identical in scope):

- Is the conduct made possible only by the absence of competitive conditions?[5]
- Is the conduct something that only a firm with substantial market power [dominant firm] can do?[6]
- Could the conduct be done if the market were vigorously competitive?[7]

The Courts have recognised however that this test is difficult to apply in some situations, and have varied their analyses accordingly. For example, the Federal Court in *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) ATPR 41-128 recognised the difficulty in applying the test to predatory pricing conduct (when it stated, p 52,896):

> . . . the outward manifestation of a decision to engage in predatory pricing is a lowering of prices, an action which on its face is pro-competitive. The factor which turns mere price cutting into predatory pricing is the purpose for which it is undertaken.

Also, the New Zealand Court of Appeal in *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641, when considering statements of policy made by Electricity Corp Ltd, recognised that conduct which is possible in competitive markets may also be regarded as a "use" of a dominant position. It stated (p 650):

> Such statements may be said to "use" a dominant position if it is the dominant position that gives the statements the force amounting to deterrence.

Not long after this decision, Gault J in the Court of Appeal decision in *Clear Communications* recognised the difficulties caused by formulating tests which added to or substituted for the words in the Act. He stated (p 103,354):

> It is perhaps timely to caution against substituting a test helpful in applying the statutory rule for the rule itself. To focus upon what the firm in question, or any participant in the relevant market, might do in a fully competitive situation with all the variables which might or might not occur may merely complicate rather than solve the problem. It attracts the construction of theoretical economic models the material characteristics of which may give rise to differences of opinion among even the most expert economists. In circumstances where there is an absence of empirical evidence there will inevitably be elements of speculation. That, of course, is not to decry the importance of relevant economic principles but they must be employed to aid the application of the statute to proved commercial circumstances not to supplant that process.

The Privy Council test – that a person cannot be using their dominant position if they act in the same way as persons not in a dominant position (but otherwise in the same circumstances) could act – if adhered to rigidly, is a giant step backwards. It has the potential to remove from the scope of s 36 a good deal of conduct already decided as contravening that section (or the Australian equivalent) – for example predatory pricing, refusals to supply, abuse of legal rights (such as litigation), exclusive dealing, and price discrimination. Unlike the *Queensland Wire* test, which provides what *will* be a "use" of a dominant position, and leaves room for other tests where applicable, the Privy Council test in *Clear Communications* sets out what will *not* be considered to be a "use" of a dominant position – ie anything that a firm which is not dominant can do (when it is otherwise in the same circumstances). To make such a test work, reliance would have to be placed on the words "otherwise in the same circumstances" to allow for situations for which such a test is clearly inappropriate.

The role of "use" in section 36

It is clear that the Courts must consider whether there has been a "use" and whether there has been a relevant purpose, as two separate inquiries. Not every situation in which a dominant firm has an anti-competitive purpose will contravene s 36; neither will every use of a dominant position be a contravention of s 36. Both inquiries are important, and each should have meaning. The Australian High Court in *Queensland Wire* emphasised the neutrality of the term "use"/"take advantage of", and described the relative roles of the two inquiries. Mason CJ and Wilson J stated (p 584 (ALR); p 50,010 (ATPR)):[8]

> The phrase "take advantage" in s 46(1) does not require a hostile intent inquiry – nowhere is such a standard specified. And it is significant that s 46(1) already contains an anti-competitive purpose element. It stipulates that an infringement may be found only where market power is taken advantage of for a purpose proscribed in para (a), (b) or (c). It is these purpose provisions which define what uses of market power constitute misuses.

The role of the word "use" is to provide a causal connection between the conduct of the firm and its market power/dominance. This was stated explicitly by the Court in *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* (1992) ATPR 41-196, at p 40,644:

> There must be a causal connection between the conduct alleged and the market power pleaded such that it can be shown that the conduct is a use of that power. In many cases the connection may be demonstrated by showing reliance by the contravenor upon its market power to insulate it from the sanctions that competition would ordinarily visit upon its conduct.

The tests extracted from *Queensland Wire* and *Clear Communications* earlier are attempts to make this causal link. However, does a causal connection dictate that use of dominance be shown *only* when the conduct could have been done by a dominant firm only (or firm with significant market power)? Is a firm using its dominance only when it is doing something that only a dominant firm could do? Can a causal connection still be shown when a dominant firm is doing something which a non-dominant firm might do?

It is tempting to try to formulate an all-encompassing test for "use", a single way of proving a causal connection. However, any such test would severely narrow the application of s 36, and inevitably remove from its scope activity which presently is regarded as contravening the section.

Problems with formulating a single test for "use"

There are a number of distinct difficulties with formulating a single test for "use".

(i) *"Dominance" vs "market power"*

Section 36 (NZ) refers to a "dominant position in a market", whereas s 46 (Aust) refers to "a substantial degree of power in a market". The Australian threshold is lower than the dominance threshold in New Zealand – ie "dominance" requires a higher level of market power to be shown than does "a substantial degree of power". If the New Zealand test for "use" was to require conduct that only dominant firms could engage in, then it would not catch conduct which firms which had a substantial degree of "market power" but not "dominance" could engage in. How important is the word "dominance" in the test? Is s 36 aimed at abuse of market power, or just behaviour attributable to that high level of market power defined as "dominance"?

(ii) *Conduct that takes place outside the market*

If all predatory conduct by firms with market power took place in the market place (for example, predatory pricing, refusing to supply, tying arrangements etc), then a single test for "use" *might* be possible. However, conduct such as the enforcement of legal rights for anti-competitive reasons, for example the prevention of a rival's entry into the market, is conduct outside of the market. The ability to engage in such conduct is not dependent on the existence of market power. The normal market constraints do not operate to direct when this conduct is likely to be used. The Court of Appeal considered this type of conduct in *Geotherm* and found it to be capable of contravening s 36.[9] The Court stated (p 649):

> We do not consider that s 36 when read with s 3(8) is intended to be confined to market activity *in* the production, acquisition, supply or pricing of goods or services. Clearly it extends to conduct capable of "influencing" those market elements. There must, however, be a clear and direct link between the influence and the dominant position.

In such cases the proper context in which to view the conduct at issue is in conjunction with its purpose or effect. It is not helpful merely to focus on the type of conduct and ask whether a non-dominant firm could do this or whether it is possible only for a dominant firm.

(iii) *The nature of the conduct itself*

If a single test (such as in *Queensland Wire* or *Clear Communications*) were to be adopted, much would hinge on the definition of the conduct in question. If conduct was defined narrowly, for example a refusal to supply, then it is clear that firms with all levels of market power as well as those with no power at all can engage in such conduct. The Court of Appeal in *Geotherm* (p 649) recognised the need to view the conduct in its market context. When the *purpose* for the conduct is included in the definition of conduct, then refusals to supply to deter competitive conduct will be recognisable as requiring some level of market power, whereas refusals to supply because of poor credit risk or because of inability to meet the size of an order will have nothing to do with market power or anti-competitive purpose. This was recognised by the Court of Appeal in *Geotherm* when it noted (p 649):

> The actual conduct under scrutiny in that case [ie *Queensland Wire*] was refusal to supply goods that could have been done by a supplier with a single customer. It was not the conduct itself that amounted to a use of market power for the prohibited purpose but the conduct in the market context for the particular anti-competitive purpose. This illustrates the difficulty in separating use of market dominance and purpose.

As mentioned earlier, the Court in *Eastern Express* (p 52,896) recognised that pricing at a very low level is something one might expect a firm in a competitive market to do. It is the purpose of the price cuts which distinguishes that which is legal from that which is predatory and would contravene s 36. Even if predatory pricing was to be defined as pricing below marginal cost, it is still possible for non-dominant firms to do this for competitive reasons (such as getting a foothold into the market).

Sometimes it is helpful to describe the conduct at issue by considering the effect that it has. For example, a dominant firm might seek to raise its rival's costs (through extensive litigation costs and time delays) by embarking on a programme of legal challenge in order to prevent the entry of that rival. This might be possible through a single protracted legal action, for example, under the Fair Trading Act 1986, or the tort of passing off, or maybe objection to planning permission (etc). Such actions may be done for legitimate reasons by firms in competitive markets, as well as by dominant firms. One factor which might distinguish legitimate from illegitimate conduct in such cases is its purpose. However, firms in competitive markets may still exercise their legal rights for anti-competitive reasons (although they are less likely to do so than firms with market power). What clearly distinguishes legitimate from illegitimate conduct is the effect of that conduct. The Court of Appeal in *Geotherm* recognised that when it stated (p 650) that such conduct:

> may be said to be a "use" of a dominant position if it is the dominant position that gives the statements the force amounting to deterrence.

Sometimes the conduct of a dominant firm is motivated by pressures from outsiders. It may be that its reason for refusing supply is a response to pressure from one of its suppliers (for example, a supplier which has a subsidiary competing with the person being refused supply (by the dominant firm)). It would be difficult to show that the dominant firm could not have acted that way had it not been dominant, for a firm with less market power may be even more likely to accede to the wishes of the supplier. Certainly the *effect* of the conduct (ie not being able to obtain supply) is the result of the fact that the firm has dominance, and the purpose of the conduct is definitely anti-competitive. (*ARA v Mutual Rental Cars (Auckland Airport) Ltd*

[1987] NZLR 647 can be analysed in this way.)

It is in this issue of definition which appears to separate the Court of Appeal from the Privy Council in *Clear Communications*. Although it is true that a firm in a competitive market would use the Baumol/Willig pricing formula which enabled the recoupment of opportunity costs, opportunity costs in a competitive market would not include monopoly profits. However, the opposite is true in markets where there is a lack of competition. Counsel for Telecom recognised this in his argument before the Privy Council, when he stated (Day 8):

> . . . it is all very well saying that you are only applying the same principle, opportunity costs, as would be applied in conditions of competition. The difficulty is that you are now applying it to a price which itself is fixed in monopolistic circumstances and, therefore, it might be said that that is using a dominant position even though the principle opportunity cost is the same as would be applied in conditions of full competition.

The Court of Appeal clearly viewed the relevant conduct to be the use of a pricing rule which enabled the recoupment of monopoly profits. The Privy Council viewed the relevant conduct to be the use of the Baumol/Willig pricing rule. The Court of Appeal was able to find that Telecom could only impose such a pricing rule, (which enabled the recoupment of monopoly profits), because it was dominant in the market. The Privy Council, because of its narrow view of the relevant conduct, could find that there was no use of a dominant position because firms in competitive markets would use the Baumol/Willig rule. With respect, this is an unnecessarily narrow view of the conduct at issue in this case.

The Privy Council did consider the market context of the conduct in that it considered that Telecom's conduct should be compared to conduct of like firms in a contestable market (ie network owners which also provided telephone services to customers, using those networks). It stated (p 21):

> If, as their Lordships consider, it is legitimate and necessary to consider how the hypothetical seller would act in a competitive market, attention must be directed to ensuring that (apart from the lack of a dominant position) the hypothetical seller is in the same position vis-a-vis its competitors as is the defendant. Thus in the present case it is the fact that Telecom is both a supplier of an essential service to Clear and a competitor of Clear in the contested area that makes the case so difficult. It is essential that this duality of role is not ignored, since otherwise the comparison is a false one. For this reason their Lordships have reservations about the principles stated at the end of Cooke P's judgment viz that Telecom's charges should be paid on the basis of what "a network owner not in competition for the custom of subscribers" would charge. Such a formula does not reflect the actual position in which Telecom finds itself.

With respect, this is a very artificial way of viewing market context, unless the Court was certain that any possible market would actually be like that. For if the market included a network supplier which did not use the network itself (or for a subsidiary) in competition with its customers, then the price charged for interconnection could be competed down to marginal cost. Even a firm which uses its network to provide end services to customers may not be able to take up all the market sought by its competitors. Why therefore should it receive the profits from such services? Again with respect, a more useful way of considering market context would have been to recognise that opportunity cost includes monopoly profits when applied to markets where there is little competition, but not when the market is a competitive one. There should have been recognition that the Baumol/Willig rule was designed to apply primarily to markets where competitive market forces are able to operate, or where prices are controlled by regulatory agencies. This point was recognised by Cooke P in the Court of Appeal (p 103,343), and also by Professor Baumol himself in his article (co-authored by J Gregory Sidak) "The Pricing of Inputs to Competitors" ((1994) 11 Yale Journal of Regulation, 171, 195).

The connection between "use" and "purpose"

The Australian High Court in *Queensland Wire* saw clearly the connection between "use" (NZ)/ "take advantage of" (Aust), and purpose. Mason CJ and Wilson J referred to the purposes in s 46(1)(a) - (c) (NZ s 36(1)(a) - (c)) and stated (p 584 (ALR); p 50,010 (ATPR):

> It is these purpose provisions which define what uses of market power constitute misuses.

The New Zealand Court of Appeal recognised the importance of the purpose provisions in further defining what uses of a dominant position would contravene s 36 in the *Geotherm* and the *Clear Communi-cations* cases. In *Geotherm*, the Court stated (pp 646-647):

> There will be circumstances in which the use of the market position and the purpose are not easily separated but the two requirements must be kept in mind.

It went on to state (p 649):

> The distinction between vigorous legitimate competition by a corporation with substantial market power and conduct that contravenes the section is the purpose of the conduct . . . Market power can be exercised legitimately or illegitimately . . . It was not the conduct itself [in *Queensland Wire*] that amounted to a use of market power for a prohibited purpose but the conduct in the market context for the particular anti-competitive purpose. This illustrates the difficulty in separating use of market dominance and purpose.

In *Clear Communications* it stated (1993) 4 NZBLC 103,340, 103,354; (1993) 5 TCLR 413,430):

> It is the purpose of the conduct which distinguishes what is proscribed from what is legitimate. If the conduct in question does not involve use of a dominant position in a market, purpose alone will not contravene. In most circumstances the use and the purpose will not be easily separated and need not be.

Unfortunately, the Privy Council in *Clear Communications* (p 20) appears to have taken the opposite view, placing emphasis on "use" rather than "purpose".

> If a person has used his dominant position it is hard to imagine a case in which he would have done so otherwise than for the purpose of producing an anticompetitive effect; there will be no need to use the dominant position in the process of ordinary competition. Therefore, it will frequently be legitimate for a court to infer from the defendant's use of his dominant position that his purpose was to produce the effect in fact produced. Therefore, as the Court of Appeal in the present case accepted, use and purpose, through separate requirements, will not be easily separated . . . Although it is legitimate to infer "purpose" from use of a dominant position producing an anticompetitive effect, it may be dangerous to argue the converse ie that because the anticompetitive purpose was present, therefore there was use of a dominant position.

The Privy Council appears to have taken the view that any test for "use" must be tight enough to determine which conduct will or will not contravene s 36. With respect, this has never been necessary. Any test for "use" could well include conduct which should not be held to contravene the Act, for where "use" has been found, the Court has still to determine whether there has been a "purpose". The High Court of Australia appears to have recognised this and the New Zealand Court of Appeals also. The latter has had to deal with fact situations for which the usual tests for "use" have not been adequate. It is unfortunate that the Privy Council has taken a view which is at variance with that of the High Court of Australia. This could well mean that the case law from s 46 (Aust) will take quite a different direction to that of s 36 (NZ).

The way ahead?

The test for "use" of a dominant position put forward by the Privy Council in *Clear Communications* has the potential to be very narrow in scope, and to exclude from the ambit of s 36 a good deal of conduct which has in earlier cases been held to be contraventions of that section. It may however be possible to take a broad view of what constitutes the conduct at issue, and to take into account the market context (including if necessary effect or purpose). If conduct is to be tested against that which would be done by a person not in a dominant position *but otherwise in the same circumstances*, some room exists for consideration of these factors. However, as the conduct identified as relevant by the Privy Council in *Clear Communications* was so narrowly defined, this could well discourage a broad view being taken. In any case, the Privy Council test is unhelpful for, unlike the *Queensland Wire* test which does not rule out the use of other tests where found to be more appropriate, the Privy Council test explicitly rules out all conduct that non-dominant firms (in otherwise the same circumstances) could do.

It is important therefore to ascertain just what it does rule out, and to consider whether this is what is actually desired. It is probably unhelpful to leave it to the Courts to work out, as a similarly narrow view might emerge from the Privy Council on another occasion. If it is desired to ensure that s 36 is still able to catch conduct such as refusals to supply, predatory pricing, and misuse of legal rights, the Act will have to clearly outline an alternative approach. It would be helpful also to consider whether the section is expected to catch misuse of market power by dominant firms, or misuse of that level of market power attributable to dominance alone.

Unless it is desired to narrow the scope of s 36, a single test for use will be inappropriate. There is more than one way of making the causal connection between "use" and the dominant position. The way ahead has been indicated quite clearly by Gault J in the Court of Appeal decision in *Clear Communications* when he expressed concern about substituting a test helpful in applying the statutory rule, for the rule itself (p 103,354). A helpful way to proceed would be to specify in the Act that "use" of a dominant position should be determined as a causal link between the conduct at issue and the dominance, and then to outline the ways in which "use" might be determined. These should include:

(i) Conduct which would only be done by a firm with market power, or which would not be done by a firm in a competitive market situation; and
(ii) Conduct which only has an anti-competitive effect when carried out by a firm with market power; and
(iii) Any other method that the Court thinks best describes the causal connection between use and dominance in the particular case, taking into account the market context of the conduct.

An overriding statement that it is the purpose of the conduct which determines which uses contravene the Act would also be helpful. This would ensure the importance of the determination of "purpose", and consistency with cases in Australia. The above guidelines would spell out what a Court is endeavouring to do in determining "use" (ie determining the causal connection), and would leave it to the good sense of the Courts to understand which method to choose. It should always be remembered that whatever a Court determines with respect to "use" is not the end of the matter – the Court must still determine whether there has been an anti-competitive purpose. □

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1 ie the profit the supplier sacrifices by supplying the competitor ((1993) 4 NZBLC 103,340, 103,343 CA).
2 Over the sector from the interconnection with Telecom's network and the Clear customer and vice versa (p 10 PC).
3 At p 103,354 – but note that Gault J had proposed this with respect to essential facilities situations only, which is consistent with the common law rule for the pricing of prime necessities – see *Auckland Electric Power Board v Electricity Corporation of NZ* [1993] 3 NZLR 53; [1994] 1 NZLR 551.
4 Section 46 (Aust) reads: "A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of . . ."
5 *Misuse of Market Power – Section 46 of the Trade Practices Act 1974*, Trade Practices Commission Background Paper, Canberra, February 1990, p 27.
6 F H Hanks & P L W Williams, "Implications of the Decision of the High Court in Queensland Wire" (1990) MULR 437, 444; and G Corones, "Misuse of Market Power", editorial commentary in A I Tonking & R J Alcock (eds) *Australian Trade Practices Reporter*, Australia, CCH Australia Ltd, 1991, para 3761).
7 Above n 6.
8 See also Toohey J at p 602 (ALR); p 502,023 (ATPR).
9 Note that the exemption in s 36(2) for the enforcement of statutory intellectual property rights would not be there if such an action was not possible under s 36.

What amounts to an assumption of responsibility?

By Mary-Anne Simpson, Faculty of Law, University of Canterbury

The case of Spring v Guardian Assurance *in the House of Lords has been commented on earlier in* The New Zealand Law Journal *in an editorial at [1994] NZLJ 273, and in an article by Rosemary Tobin at [1994] NZLJ 320. This present article considers particularly the proximity question in what constitutes "an assumption of responsibility". The case had involved the giving of a testimonial concerning a former employee, which the Court held had been given negligently. The issue accordingly was whether there was a duty of care in the circumstances.*

Assumption of responsibility in the law of negligence – an inherently vague notion – is central to the recent decision of the House of Lords in *Spring v Guardian Assurance plc* [1994] 3 All ER 129. A tortfeasor's liability may turn upon whether he or she has "assumed" a personal responsibility in regard to his or her conduct. Proximity between the parties may be hard to establish – as in the case of a negligent misstatement – unless it can be shown that the defendant has in some way accepted that liability for injury caused through negligent performance of the act may fall at his or her feet. Since *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL), assumption of responsibility has been a regular – if never a consistently applied – feature of determination of the duty issue. Unfortunately, *Spring v Guardian Assurance* and the contemporaneous *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 decisions do not undertake the thorough-going analysis of this issue that might have been anticipated. Rather, the House of Lords confound comprehension of what was already a bedevilled principle.

Spring v Guardian Assurance concerned the negligent preparation of an employment reference. The plaintiff had been a sales representative for Guardian Assurance, an insurance company. During the takeover of the company Spring was dismissed, and later applied to become a representative for Scottish Amicable, another insurance company. Both companies were members of the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), the insurance industry's self-regulatory body. Under LAUTRO's Code of Conduct a prospective employer was required to seek, and a former employer obliged to supply, a reference as to the applicant's character, aptitude and experience. Guardian Assurance tendered a reference which was, in the words of the trial Judge, "so strikingly bad as to amount to . . . 'the kiss of death' to his career in insurance". It stated that Spring was "a man of little or no integrity and could not be regarded as honest". Specifically, it was said, Spring ignored the "best advice" concept, and consistently sold only those policies which would bring in the highest commissions. After receiving the reference, Scottish Amicable refused to appoint the plaintiff, as did the several companies to which Spring subsequently applied.

Judge Lever QC, at trial, found that the plaintiff had been guilty of inexperience and incompetence, but was not dishonest and did not lack integrity. The plaintiff had commenced an action against Guardian Assurance framed in malicious falsehood, breach of contract and negligence, to recover the earnings he claimed were lost as a result of these mistaken allegations. The action in malicious falsehood foundered, as malice was not established. The action in contract also failed. Yet the House of Lords did entertain Spring's argument that the defendant had, in preparing the reference, been under a duty of care to him, which it had breached by negligently misstating the true position.

Concurrent liabilities

The issue in this case can be succinctly stated: does the supplier of a reference owe a duty of care to the subject of the reference? The majority of the House of Lords held that an employer who supplies a reference in respect of a former employee owes that employee a duty to take reasonable care in its preparation, and will be liable to him or her in negligence for a failure to do so causing damage. In adopting an approach curiously reminiscent of that taken in *Anns v Merton London Borough Council* [1978] AC 728, the House of Lords considered not merely the proximity of the parties, but the notion that admitting a duty of care in negligence would undermine the law of defamation. Their Lordships rejected this, and permitted the existence of concurrent liabilities, even where this involved trespass into other areas of the law (see Todd "Negligence in New Zealand and England: Convergence, Divergence or What?" (1993) 10 PN 146). The proximity "limb" of the test is, however, the central concern of this note.

The two principal factors stated in *Hedley Byrne* to constitute the source of a duty of care – viz, an assumption of responsibility by the defendant, accompanied by the plaintiff's reliance – again feature prominently in the lengthy speech of Lord Goff in *Spring v Guardian Assurance*. Lord Goff identifies the foundation of a duty of care in the

undertaking of responsibility by the defendant, and reliance upon this by the plaintiff. So much so good. What, though, constitutes an "assumption of responsibility"? His Lordship answers the question thus:

> . . . where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct . . . (at 130).

The factors which went towards an assumption of responsibility in this instance included the employers' "special knowledge", that the reference was provided for the assistance of the employee as well as of third parties, the fact that provision of references by employers is a common service, and the plain reliance that the employee placed upon the exercise of due care and skill in its preparation (per Lord Goff at 131). The proposition is a simple and familiar one: you will have assumed a duty of care if you are possessed of special knowledge, and you choose to act when you know – or ought to know – that you are being relied upon.

Different contexts for "assumption"

The language of "assumption of responsibility" has entered the dialect of tort law in the same way as that of "proximity" and "foreseeability". Unlike those concepts, however, the notion of "assumption" has never been satisfactorily defined or explained (see K Barker "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 LQR 461). It is clear that the term "assumption of responsibility" is used in a number of different ways. In some cases an "assumption" is spoken of as a *promise* – a relationship which is "equivalent to contract" (see, for example, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 528-529, per Lord Devlin; *Ross v Caunters* [1980] Ch 297; *Harris v Wyre Forest District Council* [1990] 1 AC 831). These are cases in which, but for the absence of consideration, a contract would be found to exist. Whether by words or by a course of conduct, the defendant has expressly or impliedly undertaken to exercise care in regard to the plaintiff. In other cases, that "assumption" is represented, it is said, by a *choice*. But what it is that the defendant has chosen is often far from clear. Sometimes it is said that the defendant has assumed liability by choosing simply to act (*Caparo Industries plc v Dickman* [1990] 2 AC 615; *Horsley v McLaren (The Ogopogo)* [1969] 1 Lloyd's Rep 374). Other cases have held that the defendant assumes responsibility only where he or she chooses a legal obligation, in the sense of being aware that the conduct may carry legal consequences (*Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009). An assumption has also been identified in a defendant's choice to enter a relationship where it is known that reliance exists or has been induced by the defendant (*Al-Kandari v J R Brown & Co Ltd* [1988] QB 665; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 583, per Lord Reid).

The cases which speak of "assumption" as being founded upon *voluntary action* by the defendant are closest to the reasoning in *Spring v Guardian Assurance*. In *Reid v Rush & Tompkins plc* [1990] 1 WLR 212 Ralph Gibson LJ stated that

> . . . the concept of voluntary assumption of responsibility . . . seems to me to refer to an act by a defendant whereby he voluntarily does something, which affects the plaintiff, and . . . is such an act that a reasonable man would recognise that in the circumstances he is required to perform it with due care (at 229).

Guardian Assurance were held to have "assumed" a duty of care towards Spring by virtue of electing to provide a reference for him, in circumstances where it was to be expected that he would rely upon it. The plaintiff "entrusted" the conduct of his affairs to the defendant, so the defendant may be held to have assumed responsibility to the plaintiff (*Spring v Guardian Assurance* [1994] 3 All ER 129 at 145, per Lord Goff). Liability is imposed on the defendant insurers not because they promised or chose anything, but simply because they acted voluntarily, and the plaintiff suffered entirely foreseeable damage as a result of their error.

The existence of numerous different interpretations of the principle of assumption of responsibility is fatal, it seems, to its workable application. In *Henderson v Merrett Syndicates*, Lord Goff acknowledges the ". . . tendency on the part of the Courts to criticise the concept of assumption of responsibility . . ." (at 520), yet does not recognise that such condemnation reflects adversely upon the utility of the concept. The assumption of responsibility in *Merrett* is patent, where the managing agents of Lloyd's underwriting members (Names) had accepted those Names as members of the syndicate under their management. This decision clearly falls within the "choice" model of assumption. The variation of the "assumption" principle applied in *Guardian Assurance* is, however, more problematical.

Voluntariness and compulsion

To begin with, is it really plausible to say that there has been a "voluntary assumption" in this instance? In particular, where is the element of voluntariness when a defendant is in fact compelled to act? Although it is true that Guardian Assurance willingly provided a reference for the plaintiff, they were in any case required to do so by the rules of the industry to which they belonged. Guardian Assurance were not free to refuse to give a reference. *Hedley Byrne* is perhaps distinguishable on this basis. The defendant in *Hedley Byrne*, a bank, was asked for a reference about one of their customers. They were under no obligation to give it, as the House of Lords later acknowledged in *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009 at 1027, per Salmon LJ. They chose to do so, knowing that it was likely to be relied upon, and that it might well cause damage if given carelessly. In such an instance, the validity of the language of "voluntary assumption" appears clear: the defendant's liability rests upon willingly undertaking to perform an act, with an awareness of another's reliance and the potentially adverse consequences of misperformance. In such a case, it is

relevant that the defendant chose to act.

Where the defendant has not "chosen" anything, the terminology of "assumption" becomes harder to justify. *Ministry of Housing v Sharp* asked whether land encumbrancers could sue in negligence for the failure of a government official to fulfil his statutory duty to protect their interests by searching the register of land charges. It was argued that since the council had not voluntarily executed the search, they had not voluntarily assumed responsibility for its accuracy, and therefore owed no duty of care. The House of Lords rejected this, holding that voluntary assumption of responsibility was not necessarily the applicable test, and in any case, the council had voluntarily assumed responsibility towards the plaintiff:

> . . . they certainly chose to *undertake the duty* of searching the register . . . (per Salmon LJ at 1028).

But is it realistic or helpful to say that an individual is fixed with liability because he or she "undertook" to do something which they could not refuse to do? Certainly, there may be a duty of care owed to the plaintiff. But the real question remains, "what is the source of the duty?" If it is ordinary proximity and foreseeability, founded upon the "neighbourhood" principle, well and good. The parties in *Sharp*, as in *Spring v Guardian Assurance*, may have become "neighbours" through the imposition upon one of them of a statutory or regulatory duty which impacts upon the other. This no doubt lies behind Lord Lowry's analysis that a duty of care is evidenced merely by the close proximity of the parties and the absence of any contrary policy imperative:

> This argument fails to be considered on the assumption that, but for the overriding effect of public policy, a plaintiff who is in the necessary proximate relation to a defendant will be entitled to succeed . . . (at 152).

The existence of a duty will then be determined according to established principle; it rests on the parties' "neighbourhood", and not upon one having "assumed" a duty to the other. But in cases where an "assumption of responsibility" rests in fact upon some "deemed" voluntariness of conduct, we are dealing with a concept as fictional as the restitutionary "quasi-contract" has been shown to be. Such duties are imposed rather than assumed. Whilst we may not question the existence of a duty, we may be wise to question the language that we use to refer to it.

The House of Lords in *Spring v Guardian Assurance* takes a broad view of what constitutes an "assumption of responsibility". In that case, it is said that an undertaking to give a reference by a person possessed of a special skill (including special knowledge), when that person knew or ought to have known that it would be relied upon by the plaintiff, is sufficient to constitute an "assumption of responsibility". Similarly in *Merrett Syndicates*: the agents had "assumed" responsibility to the Names by accepting them as members of the syndicate they managed, by holding themselves out as possessed of special expertise to advise the Names, and by doing so when the Names placed implicit reliance on that expertise, as the agents knew.

A New Zealand judgment

Such cases are direct descendants of *Hedley Byrne* and represent, it is true, nothing new. However, they invite comparison with the influential judgment of the New Zealand Court of Appeal in *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517. There the New Zealand Court of Appeal regarded the liability of the director of a one-person company as dependent upon the identification of an assumption of responsibility. Although ordinarily the principles of separate corporate personality and limited liability would protect a director from personal liability, it was held, liability could arise where there had been an assumption of responsibility. This, it was said, would require the plaintiff to point to "something extra" in the defendant's conduct which indicated that a personal responsibility to the plaintiff had been undertaken; "something special" was required. The factors identified in *Hedley Byrne, Guardian Assurance* and *Merrett* as sufficient for the acknowledgment – or imposition – of a duty of care were present in *Trevor Ivory*. Ivory possessed a "special skill": his agricultural and horticultural knowledge. He chose to supply his services to the Anderson partnership. And he did so realising that the plaintiffs were placing reliance upon the proper exercise of his expertise. Yet Ivory escaped personal liability. How are we to explain this?

The Court of Appeal in *Ivory* distinguished *Hedley Byrne*. That case, the Court held, centred about the banker's duty of care to the inquiring plaintiffs, rather than that of any directors, shareholders or employees of the bank. *Ivory*'s case concerned the liability not of the advisory company, but of the director behind the company. The corporate structure intervening between the plaintiff and the defendant set *Ivory* apart from the *Hedley Byrne* line of authorities. Where it is not the company itself which is being sued, but a servant of that company – in particular, its director – the syllogistic *Hedley Byrne* test for assumption will not apply. In its place, a more stringent test will operate: the defendant must have done, as Ivory had not, "something special" to convey his or her willingness to accept personal liability for wrongs of the company. Although the Court of Appeal in *Ivory* declined to specify in advance what would be "sufficiently special" conduct (per Cooke P at 524), cases like *Fairline Shipping Corp v Adamson* [1974] 2 All ER 967 indicate that the use of the personal pronoun in company correspondence, for example, will amount to an assumption of responsibility.

Personal responsibility

Twin tests, then, operate in regard to cases like *Spring v Guardian Assurance* – a fact not made clear by the House of Lords (nor, indeed, by many critics of *Ivory*, who mistakenly perceive it as contrary to, rather than complementary to, *Hedley Byrne*: see Wishart (1992) 10 C&SLJ 363; Wishart "Anthropomorphism Rampant: Rounding Up Executive Directors' Liability" [1993] NZLJ 175; Fridman "Personal Tort Liability of Company Tort Directors" (1992) 5 Canta LR 41). *Spring v Guardian Assurance*, like *Merrett Syndicates* and *Hedley*

Byrne before it, are concerned only with the liability of the corporate entity in whose name the misstatement was made. Where the corporation itself has ample funds to meet a judgment debt, recourse to the individual human factor cannot bring the plaintiff any additional benefit. In such a case, it will be sufficient to ask whether the defendant company has assumed responsibility to the plaintiff; largely this will turn upon the possession of a special skill, and reliance upon the proper exercise of this by the plaintiff. Where, however, the company is insolvent or otherwise "judgment proof", as in *Trevor Ivory*, it may be thought necessary to sheet home personal responsibility to the face behind the company.

At present, the *Ivory* test is generally regarded as applicable only where the defendant is the sole director of a close corporation. But recent dicta of the Supreme Court of Canada in *London Drugs Ltd v Kuehne & Nagel International Ltd* (1994) 97 DLR (4th) 261 emphasises the extent of contemporary academic and judicial criticism of the vicarious liability doctrine, imposing liability upon an individual for torts committed in the course of his or her employment (see La Forest J at 280). In the light of such calls for reconsideration of employees' liability, the "something additional" requirement in *Ivory* may come to be applied to any individual who negligently performs a company act.

The meaning of the term "assumption of responsibility" is further complicated, then, by the operation of dual tests. Where an action is brought against a company, "assumption" bears one meaning. Where an action is brought against the individual behind the company – concerning the very same conduct – "assumption" bears another. The term is not an easy one with which to grapple. □

Correspondence

Dear Sir

I was counsel for the four women whose application for costs is commented on by John Rowan [referring to the *Davidson* case, in his article published at [1994] NZLJ 451].

Legal costs of $55,275 were paid by legal aid. Against that amount the four women paid a total of $32,750.00 in contributions (not $25,250.00 as recorded in the judgment).

In addition they accepted direct liability for a further $46,000.00 approximately in costs. One of the women had paid her total contributions to legal aid plus the remaining sum due to the solicitors (approximately $20,000.00) before the costs application was filed.

Although the matter had not been raised in argument, the Court attached significance to the fact that there was no evidence that an application had been made to the District Legal Services Sub Committee for increased fees on the basis that the amount they had fixed was inadequate (pursuant to s 12 of the Legal Services Act1991). In fact the remuneration had been fixed by the District Sub Committee after all the work had been completed. An application had already been made for remuneration to be fixed at a higher level. Section 12 empowers a Sub Committee to increase remuneration only where the amount fixed originally had become inadequate by reason of a change of circumstances since the amount was fixed.

The Court of Appeal in *R v K G de Rouffignac* CA 100/86 in 1986 confirmed that there was no right of appeal in respect of a decision on costs under the Costs in Criminal Cases Act 1967. The judgment being of the High Court was not amenable to judicial review. In the *de Rouffignac* case the Court of Appeal had suggested that it may well be appropriate for both the Crown and the defence to have a right of appeal, at least by leave of the Court of Appeal. The Court noted that the amounts potentially involved could be considerable.

The lack of a right of appeal was brought to the attention of the Minister of Justice. The Minister has indicated to me that he accepts a narrow right of appeal is desirable. He has indicated that while it is not a matter of urgency he hopes that it will be possible to deal with the matter in a forthcoming Law Reform (Miscellaneous Provisions) Bill.

G H Nation

Dear Sir

It is of some concern that I read the "headline" that had been inserted by the editor of the *New Zealand Law Journal* above the article by Mr Loury. The headline "Their Blacks – Our Browns?" seems to suggest that the comments made by Mr Loury in his article could somehow be applicable to the circumstances of the Maori people of New Zealand.

For such a suggestion to be made by the *New Zealand Law Journal* undermines it and the profession and shows a level of ignorance which should, in 1995 not be present amongst the editorial staff of the *Law Journal* nor the profession. It is disappointing that the *Law Journal* should choose to publish the thoughts of one man, commenting from a personal viewpoint about the situation of ghettoised black Americans and expect that it has some relevance to New Zealand's situation which is vastly different and should not be dealt with in a flippant or cursory manner.

This disgraceful piece of editorial judgment is an indictment upon the *Law Journal*. The *Law Journal* would do better to use its pages constructively to inform the profession of the legal issues facing Maori individuals and groups in an informed and balanced manner.

Kathy L Ertel
Partner, Luckie Hain

[Raising questions, one would have thought, is surely always a useful intellectual activity. Subscribers are invited to re-read the item referred to at [1995] NZLJ 28. – Ed]

Books

Courts and Country: The Limits of Litigation and the Social and Political Life of Canada

By W A Bogart

Oxford University Press, Toronto (1994) ISBN 0 19 541035 1
New Zealand price $79.95

Reviewed by D F Dugdale

A problem often discussed by Canadian writers is how that nation's culture is to be preserved from being swamped by influences from its large and powerful neighbour to the south. In *Courts and Country* Professor Bogard who occupies the chair of law at the University of Windsor considers this broader issue in the specific context of the social and political role of Courts of law. He has no confidence that good will come of the enactment in 1982 of the Charter of Rights and Freedoms (which of course follows a United States model). He argues for a limited role for litigation. He sees dangers in the converging of judicial and political processes.

The prevailing ideology of the United States derives, Bogart believes, from the liberal philosophy of John Locke and treats individual rights as paramount. Canada on the other hand in affinity with Western Europe subjugates individualism to government action intended to be for the common good. The Charter changes the emphasis from the traditional Canadian model of citizen participation to the United States rights model.

Bogard summarises the effect of the Charter on the power balance between Courts and legislature in these terms:

> In bluntest terms, two very different models of democracy are at stake. The first recognises the power of the ballot that is curbed by independent and tenured judges who ensure that rationality and principle are never ejected by impetuous legislatures, rigid bureaucracies, and a dulled citizenry. In this model, courts will shelter the disadvantaged, who will harness that rationality and principle. The second model places its confidence in those who can claim the power of the ballot. Realistic about democracy's foibles, it is even more reserved about using judicial intervention to solve them. In this model, judges' independence and tenure make them unaccountable, elitist, and, at present in any event, unrepresentative. The apprehension is that far from invigorating democracy, judicial review will sap it with regressive decisions, progressive decisions that nonetheless blunt popular responses to societal problems, and barriers to access because of the costs of litigation. In this second model, those who seek social reform may have the most to lose in the courts.

There is discussion on the effect of the Charter of Judges' views of their own role and standing. Bogart quotes these extra-curial observations of Sopinka J

> Currently in Canada we do have judges who regularly accept public speaking engagements. I believe this practice ought to be encouraged as it provides an excellent forum for the public to learn more about their judges, and the courts which govern their lives. As custodians of the Charter of Rights, judges are now performing a supreme public service

giving critical attention to "the Courts which govern their lives", "custodians of the Charter of Rights" and "supreme public service". One could not with a clear conscience categorise the self-image implicit in such phrases as modest or unassuming. Bogart quotes the Chief Justice as saying that the introduction of the Charter has been nothing less than "a revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the intervention of penicillin and the laser" and adds

> It will be noted that no upheaval of less benign consequences made the Chief Justice's list. His comments may, however, reflect the potential danger of the Charter and its trial of litigation: complex and problematic consequences ignored with high-mindedness and illusions the order of the day.

Bogart develops his arguments by considering such topics as tort and judicial review of administrative action. Most telling perhaps is his discussion of the criminal law where adoption of the due process model (and in particular the exclusion of evidence wrongfully obtained) has been at the expense of the community's need for efficient crime control. The ordinary citizen's faith in the justice system has been shaken, for "seeing a guilty person go free because of some violation [of the Charter] may in fact be a greater disservice to the cause of justice than admitting the tainted evidence".

All this is of course sadly familiar to the New Zealand reader. Bogart's analysis of the Charter as representing a shift from community responsibility to individual demands helps us to understand that the New Zealand Bill of Rights Act 1990 was philosophically consistent with the shameful dismantling of the welfare state begun by the administration responsible for its enactment. We too have heard the contention, which no doubt had a special attraction in the immediate post-Muldoon era, that Judges should have power to curb the excesses of legislatures insensitive to minority beliefs and aspirations. The trouble with this argument is that in practice in times of crisis (which is when it really matters) Judges prove as defenders of civil liberties to be broken reeds. Anyone who doubts this should consider the treatment by the Courts of pacifists and other opponents of New Zealand's involvement in World War II (there is a good discussion in the relevant volume of the Official War History, Nancy M Taylor *The New Zealand People at War, The Home Front* (1986), Government Printer, Wellington, Chs 5 and 6), or the penalty of imprisonment for a trivial public order offence imposed on the union leader Barnes by a magistrate and upheld on appeal at the time of the 1951 waterfront strike or lockout.

We too have seen a subtle flexible and just set of rules for the admissibility of inculpatory statements swept aside by the mechanical application of a *Miranda* type requirement; and the consequent unmeritorious acquittals. In this jurisdiction too, despite the limited effect of the statute that the parliamentarians thought they were enacting, there have been vaunting judicial claims as to the powers that the statute confers upon the Courts.

New Zealand lawyers have tended to regard Canada as a sort of quarantine station which enables us to see whether possible imports from the United States when exposed to a legal climate more closely akin to our own manifest any undesirable features that would lead us to reject them. This roughly is the history of the proposed Personal Property Securities legislation and of the New Zealand Bill of Rights Act 1990.

But a quarantine station is of little use if information on matters that would brand the import as undesirable is suppressed. It may be that had there at that time been available to New Zealanders some equivalent of Bogart's cogently argued report on the Canadian experience not even the desire of the Parliamentary Labour Party to present its shortly to be deposed leader with a consolation prize would have sufficed to ensure the enactment of the New Zealand Bill of Rights Act 1990.

The Canadian Charter is entrenched, so that Professor Bogart is constrained to conclude his excellent treatise by quoting "We are in the rapids and must go on". New Zealand avoided the ultimate silliness of entrenchment, and could and should turn back. Repeal of the New Zealand Bill of Rights Act 1990 is the only sensible course. □

English women in the profession

It was in 1896 that Ethel Benjamin of Dunedin became eligible by law to join the legal profession. It was 23 years later that this became possible in England and three years after that date that the first woman solicitor was admitted. The following extract is taken from the Law Society Gazette *of 7 December 1994.*

Statistics show the legal profession is rapidly developing into a female province, with easily more than half of the newly qualifieds being women.

It is fitting therefore that the Association of Women Solicitors (AWS) is to organise a big event this week to celebrate the 75th anniversary of the legislation which pulled down the barriers into the profession for women.

The Sex Disqualification (Removal) Act 1919 may be somewhat prosaically titled, but it represented a milestone in British professional life.

In 1922, Cambridge graduate Carrie Morrison became the first woman to be admitted to the Roll before going into private practice with her solicitor husband.

Four others quickly followed and between them they created the 1919 Club. In the mid-1980s the name was "modernised" to the current AWS.

On 9 December [1994], the 7000-member group will commemorate the enactment of the 1919 legislation at a dinner at London's Guildhall. 500 people are expected to be there to hear the guest speaker, Labour MP Betty Boothroyd, Speaker of the House of Commons, who left school herself at 16 but who went on to receive four honorary law degrees. □

Judges' constitutional status

. . . there is a growing tendency [in England] to view the judiciary as just another arm of government which is a mere service industry. While there is a need to rethink the way in which the courts operate it should not be at the expense of their constitutional role. The democratic reality is that whether judges should stay in country pubs; how their court lists should be managed; or how media wise they should be are not limited questions. They cannot only be considered in the context of economic rationalism or efficiency but also must be considered within a constitutional context.

Liz Fisher
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The justice system as "the usual suspect"

By Jeffrey Miller

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Does the legal profession have a duty to educate the public? Does the government?

For me, this is a subtext to the loud public controversies over the recent *Daviault*, *Latimer*, and *Budreo* cases. Each, of course, has very different facts and juridical settings. In *Daviault*, the Supreme Court of Canada held that the accused was too drunk to form the intent requisite to support a conviction of sexual assault.

In *Latimer*, a jury convicted the accused of first-degree murder after he killed his gravely ill daughter, his expressed aim being to end her suffering from cerebral palsy.

And in *Budreo*, prison authorities released a sex offender – whose criminal record of 30-odd offences included several assaults on children – at the very end of his sentence, putting him altogether outside special supervision by parole officials.

These very different cases share at least one significant factor: Within minutes of their outcomes, people hit the airwaves and streets indicting the "justice system". Only latterly are some quieter voices surfacing, sometimes still drowned out in the din, to suggest that:

- The Supreme Court limited the *Daviault* defence virtually to automatism situations or dissociative states, defences which already existed. For hundreds of years, our criminal law has held that we do not convict people of crimes when they don't know what they are doing. Whether "taking the first drink" amounts to intent itself is an old (and important) question, and in the legislature's silence the courts do not act unreasonably to assume that legally it does not.
- There is absolutely no comparison – legally, or even morally – between assisting in the suicide of an adult who requests it (that is, the *Rodriguez* situation) and in deliberately taking the life of a child incapable of making such a request. There may be good reasons to do either, both, or neither, but they are not the same case.
- Absent a death penalty, all offenders will be released someday and, for better or worse, we have to deal with them. It has been demonstrated empirically time and again that the Jesuits were right – the child is the father of the man. By the time "the justice system" deals with an offender, it can only do remedial work, and then only if there is a public will to provide it the resources.
- It is illogical, and not particularly productive, to attack "the justice system" for following its own rules, which largely are determined by democratic government, in good faith.

As part of a democracy, we are all implicated in these decisions, and it serves nothing to attack a straw man (or institution). It is especially worrying that the citizenry see their own laws as something divorced from them.

It just does not occur to most people that if they're mad about the Criminal Code, if they think dangerous offenders provisions should be modified, if they want to send certain sex offenders to an arctic gulag for the duration of their natural lives, if they believe Judges should instruct juries that they can exercise discretion which Judges don't have to temper the black letter of criminal law, they should tell it to their member of parliament. But, of course, parading around in righteous indignation is much more satisfying.

An irony pointed up by this group of cases is that the "Judge-made law" of *Daviault* has provoked such outrage, while in *Latimer* and *Budreo* the public seems to expect that Judges and prison officials should be able to perform rule-making ad hoc, on the spot.

When I saw a woman on the news yelling at a jail guard because prison officials had spirited Wray Budreo off before she and fellow protesters could have at him, it made me think of the people at the grocery store who yell at the check-out girl because inflation causes price increases.

Now, of couse, most people vote without informing themselves of the issues, let alone of the workings of the democratic institutions and the electoral process which affect their daily lives. Many don't vote at all.

It is probably not surprising, then, that they have no compunction about sermonizing over *Daviault* based on two lines they heard from a TV reporter reading a script prepared by a junior copywriter who took it off a wire service who got it from a harassed and half-informed source who skimmed the last few words of a headnote and then jotted down his vague subjective notion of what the case said.

While there have been several lower Court judgments which purport to follow *Daviault*, none has reached appellate review and they hardly constitute a flood. Meanwhile, the person in the street seems to be convinced that the highest Court has held at last that "No means more beer". However tragic are the circumstances in *Latimer*, he thought about it; he *did* it. And that's the case for the prosecution.

If we want special sentencing provisions in such cases, or if we want jury instructions that jurors in fact have super-legal powers, we can have them. But every prospective juror is also a citizen of the community. That is the point of the jury system. And until those citizens take ownership of the law, they will remain blind to the fact that such a provision has nothing to do with "the justice system". It is a political matter, for Parliament – for every elector.

One often hears from lawyer apologists that "we're not doing enough to educate the public about the law". For me, this is immensely patronising, if not paternalistic. The public has at least some responsibility to educate itself, and the profession should not assist it in shirking that responsibility by becoming its handy "usual suspect" – or scapegoat. There is enough blame to go around for all of us. If lawyers have made the system incomprehensible, the public has at least some obligation to complain about that, first.

I note, for example, that the plain language movement seems to have faltered with the recession. *This* is something the profession can, and should, take responsibility for, alone, as it really is in our bailiwick and we can do something about it that will improve the common weal.

But if the citizenry wants an all-purpose whipping-boy outside of Parliament, I offer up an alternative usual suspect to the "justice system" – the Canadian educational system, for its abject failure to teach people how laws become laws and to whom they belong.

Don't they teach civics anymore? Given the persistence of this ignorance and the apparent failure of our schools to teach people about their own government, it is probably up to that government, not the legal profession per se, to initiate broad-based public education programmes, starting in grammar school. □

Repressed Memory Syndrome

Throughout the American 1980s and beyond, the interrogation of small children for their memories of recent sexual abuse played a role in many a criminal case against accused molesters who had not, in fact, done anything wrong. The social and financial costs have been enormous. To take only the most famous example, staff members of the McMartin Preschool in Manhattan Beach, California, who were accused of every imaginable horror associated with devil worship, had to endure the longest (almost seven years) and most expensive ($15 million) trial in American history before the case collapsed from the weight of its accumulated absurdities. In other instances, draconian sentences are being served and plea bargains are still being coerced in the face of transparently clear signs that the charges are bogus. Even today, our criminal justice system is just beginning to erect safeguards against the error that makes such outrages possible: the assumption that children are still reliable witnesses after exposure to their parents' and inquisitors not-so-subtle hints that certain kinds of revelations are expected of them.

Not even that much progress, however, is being made with respect to curbing parallel travesties involving the therapeutically manufactured memories of adults who decide that they must have been molested in their own childhood. On the contrary: by extending their statutes of limitations to allow for thirty years and more of non-recollection, our states have been codifying a pseudoscientific notion of repressed-yet-vividly-retrieved memory that can cause not merely injustice but enormous grief and havoc. Obviously, the impetus for such legislative backwardness is not coming from reputable psychological research – which, as we have seen, offers no support to the concept of repression even in its mildest form. The momentum comes rather from a combination of broad popular belief and a relatively narrow but intense crusading fervor.

Since 1988, the most successful communicators of both the belief and the fervor have been Ellen Bass and Laura Davis, coauthors of the "recovery manual" *The Courage to Heal*. A teacher of creative writing and her student, Bass and Davis were radical feminists who lacked any background in psychology. . . .

Precisely because their minds were unclouded by research findings, Bass and Davis uncannily reflected the ideological spirit of their moment and milieu. As Mark Pendergrast relates in *Victims of Memory*, the mounting (and very legitimate) concern about the underreported incidence of real child molestation formed only one corner of the picture. Bass and Davis also spoke to a public mood of impatient moral absolutism; an obsession with the themes, popularized by John Bradshaw and others, of codependency, the "dysfunctional family," and the "inner child"; a widespread susceptibility to occult beliefs; the rise of "lookism" and other manifestations of hypersensitivity to the violation of personal space; and the angry conviction in some quarters that all men are rapists at heart. While Andrea Dworkin and Susan Brownmiller were hypothesizing that American fathers regularly rape their daughters in order to teach them what it means to be inferior, Bass and Davis set about to succor the tens of millions of victims who must have repressed that ordeal. . . .

The recovery movement, it must be plainly understood, is not primarily addressed to people who always knew about their sexual victimization. Its main intended audience is women who aren't at all sure that they were molested, and its purpose is to convince them of that fact and embolden them to act upon it. As for genuine victims, the comfort they are proffered may look attractive at first, but it is of debatable long-term value. *The Courage to Heal* and its fellow manuals are not about surmounting one's tragic girlhood but about keeping the psychic wounds open, refusing forgiveness or reconciliation, and joining the permanently embittered corps of "survivors".

Frederick Crews
"Revenge of the Repressed"
New York Review of Books, p 49
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